No. 14897

United States
Court of Appeals
for the Ninth Circuit

HERSCHEL BULLEN, MARY H. BULLEN, J. C. HAYWARD and MARIAN S. HAYWARD,
Appellants,

vs.

G. de BRETTEVILLE, TREASURE COMPANY, WALTER B. SCOVILLE and THE ADAMANT COMPANY,
Appellees.

G. de BRETTEVILLE and TREASURE COMPANY,
Appellants,

vs.

WALTER B. SCOVILLE and THE ADAMANT COMPANY, a corporation,
Appellees.

Transcript of Record

Appeals from the United States District Court for the Southern District of California, Central Division

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif. —2-29-56

No. 14897

United States
Court of Appeals
for the Ninth Circuit

HERSCHEL BULLEN, MARY H. BULLEN, J. C. HAYWARD and MARIAN S. HAYWARD,
Appellants,

vs.

G. de BRETTEVILLE, TREASURE COMPANY, WALTER B. SCOVILLE and THE ADAMANT COMPANY,
Appellees.

G. de BRETTEVILLE and TREASURE COMPANY,
Appellants,

vs.

WALTER B. SCOVILLE and THE ADAMANT COMPANY, a corporation,
Appellees.

Transcript of Record

Appeals from the United States District Court for the Southern District of California, Central Division

NAMES AND ADDRESSES OF ATTORNEYS

Attorneys for Appellants:

FULTON W. HOGE,
908 Security Title Insurance Building,
530 West Sixth Street,
Los Angeles 14, California.

JOHN H. RICE,
900 Wilshire Boulevard,
Los Angeles 17, California.

Attorney for Appellee:

LELAND J. ALLEN,
1200 Equitable Life Building,
5th and Hill Streets,
Los Angeles 13, California. [1*]

---

* Page numbers appearing at foot of page of original Transcript of Record.

In the District Court of the United States, Southern District of California, Central Division

No. 1761-P.H.

WALTER B. SCOVILLE and THE ADAMANT COMPANY, a corporation, Plaintiffs,

vs.

G. de BRETTEVILLE and TREASURE COMPANY, a corporation, Defendants.

AMENDED AND SUPPLEMENTAL COMPLAINT

Plaintiffs for their amended and supplemental complaint herein, served and filed under and pursuant to an order of this Court duly made, [and without waiving any of the allegations of plaintiffs' original complaint on file herein,]—stricken 4/2/45.

For a first cause of action, allege:

I.

That the plaintiff, Walter B. Scoville, is a citizen and resident of the State of Utah; that plaintiff, The Adamant Company, is a corporation organized and existing under the laws of the State of Utah with its principal office in the City and County of Salt Lake in said state; that the defendant, G. de Bretteville, is a citizen and resident of the State of California; that the defendant [3] Treasure Company is a corporation duly organized and existing under the laws of the State of California with its

principal office in the County of Los Angeles of said state.

That the subject matter involved in this action is situated within the County of Los Angeles, State of California, and the within action involves a controversy between the citizens and residents of different states. That the value of the amount of the controversy, exclusive of interests and costs, exceeds the sum of Three Thousand ($3,000.00) Dollars.
* * * * * [4]

For a second cause of action, plaintiffs allege:

I.

Plaintiffs repeat and reallege paragraph I of their first cause of action the same as if set forth in full in this second cause of action.

II.

That at the trial of that certain action entitled Walter B. Scoville, et al., Plaintiffs, versus G. de-Bretteville, et al., Defendants, being docket number 441484 of the files of the superior court of Los Angeles County, California the following statements were made by the judge and counsel as indicated:

Mr. Bodkin: I want to enter my objection at this time. I don't want to waive my objection. I object to the introduction of any evidence concerning the $13,000.00 which ultimately went into that fund for the completion of the well as to whether it was a contribution, whether it was an advancement, or whether it was to be repaid out of Well No. 8, or whether it was not to be so repaid, upon the ground

it is incompetent, irrelevant and immaterial, and is outside the issues.

The Court: And I will sustain the objection. And you now stipulate, Mr. Bodkin, that it is not within the issues that neither of you are bound, none of the parties in this case are bound as to any of their rights in that matter by virtue of these pleadings, and that the matter is left the same as though this lawsuit had not been brought?

Mr. Bodkin: That is right.

Mr. Allen: I think that is all right.

The Court: And, Mr. Allen, I presume that you agree with Mr. Bodkin, that in so far as the rights of the parties are concerned, there is in this matter no determination as to the status of the $13,000.00 that has been advanced?

Mr. Allen: Yes, that is a matter that is not being raised. [23]

That under the above proceedings all matters pertaining to the $13,000 was stipulated out of the issues of said action.

That by reason of said stipulation the judgment rendered in said action had no force and effect on the contract of April 5, 1938 between these parties in so far as same applied to the said $13,000 used in the completion of said well.

III.

That the contract of April 5, 1938 between the parties to this action contained the following provision pertinent to the completion costs of said well known as Treasure No. 8:

"When the first well has been drilled to the basement the parties hereto agree to cooperate in obtaining the necessary casing and other completion equipment and material on credit or in connection with production contracts, or otherwise. If necessary, all monies payable on the royalties to be issued to Second and Third Parties, and the interest retained by First Party, after payment of operating expenses, shall be made available to pay for such completion costs."

That under said clause of said contract, a copy of which contract is attached to the original complaint in this action and marked Exhibit A and incorporated herein by reference, the costs of completion of said well were chargeable against the monies payable on the royalties of the parties to this action.

That under said clause and contract the plaintiffs were not required to raise or invest any moneys for the completion of the well.

IV.

That after said well was drilled to the basement the defendants failed and refused to put up or raise any moneys for the purpose of placing the well on production and the plaintiff, Walter B. Scoville, was thereby compelled to and did raise the sum of thirteen thousand ($13,000) dollars in order to secure a producing [24] oil well as contemplated by said contract and the said $13,000 was expended and used in the placing on production of said well with the full knowledge of the defendants.

V.

That the said Scoville between May 15, 1938 and December 23, 1938 advanced and paid into the project said thirteen thousand ($13,000) dollars upon condition that there was to be returned to him the sum of two dollars for every one dollar so advanced and to be paid out of the production of oil and gas from said well after the payment of operating expenses and other completion costs and the defendants accepted said moneys under said condition and agreed to so repay same to said Scoville.

That other than the contract of April 5, 1938 there was no other written agreemnt between these parties pertaining to said $13,000, or any sums used in the completion of the well.

VI.

That said Scoville has received back no part of the moneys so advanced and no part of the additional moneys agreed upon, although the first well has produced oil and gas and defendants have sold same for an amount of at least Two Hundred and Five Thousand, Four Hundred and Eleven and 68/100 ($205,411.68) Dollars.

VII.

That the superior court in the action mentioned in paragraph II of this second cause of action decreed that all moneys received from the sale of oil and gas from said well after same was placed on production and up to and including December 31, 1939 were properly expended in operating said well

and paying completion costs other than those paid by the said $13,000.

VIII.

That an accounting of the receipts and expenditures of said well since December 31, 1939 is necessary to ascertain that since said date there has or has not been sufficient funds in [25] addition to necessary operating and completion costs of said well to repay to said Scoville the $13,000 on the basis of two for one as alleged herein.

Wherefore, plaintiffs pray judgment:

1. That the defendants be required to account for all receipts and expenditures pertaining to said Treasure Well No. 8, since December 31, 1939, and that the expense of said accounting be borne solely by said defendants.

2. That the Court determine the amount of funds received by the defendants from the sale of the products of Well No. 8 between December 31, 1939 and down to date of judgment and determine the reasonable amount to be allowed the defendants for the operation of said well during this period, and that the Court give the plaintiffs judgment according to their respective interests together with interest at the rate of seven per cent per annum from the respective dates that the portions of said amount became due.

3. That Walter B. Scoville have judgment against defendants for twenty six ($26,000.00) thousand dollars together with interest at the rate

of seven per cent per annum from December 31, 1939.

4. That the plaintiffs have and recover their costs of suit herein incurred, and for such other and further relief as to the Court seems proper and equitable and for general relief.

/s/ LELAND J. ALLEN,
/s/ K. K. STEFFENSEN,
Attorneys for Plaintiffs [26]

Duly Verified. [27]

Affidavit of Service by Mail attached. [28]

[Endorsed]: Filed February 23, 1945.

[Title of District Court and Cause.]

ANSWER TO SECOND AMENDED AND SUPPLEMENTAL COMPLAINT
(Filed herein February 23, 1945)

The defendants, G. de Bretteville for himself alone, and Treasure Company, a corporation, hereinafter designated as the Treasure Company, for itself alone, answer the plaintiffs' Second Amended and Supplemental Complaint filed herein February 23, 1945, as follows: [31]

* * * * *

Answer to Second Cause of Action

* * * * *

II.

Answering Paragraph II of the said second cause of action these defendants deny, and each of them

denies, that by reason of the stipulation mentioned in said Paragraph II, the said judgment in said Action No. 441-484 had no force or effect on the contract of April 5, 1938, in so far as the same applied to the said $13,000.00 alleged to have been used in the completion of said well, and allege that said judgment is final and conclusive as to the rights of the parties to said action in said Treasure Well No. 8 and its production, and in connection with all of the issues determined in said Findings and Judgment in said case, even though it might now appear that the so-called $13,000.00 issue, if presented in the pleadings in said case or properly at the said trial thereof, might have given any of the parties herein some other or different rights.

III.

Answering Paragraph III of said second cause of action these defendants deny, and each of them denies, that the costs of completion of said Treasure Well No. 8 were chargeable against the moneys payable on the royalties of the parties to this action, and in this respect allege that under the terms of said contract of April 5, 1938, and a written agreement of November 2, 1938, (said last mentioned agreement being hereinafter described in defendants' first affirmative defense to said second cause of action, and a copy thereof being attached hereto as Exhibit H) the plaintiffs were obligated to pay all of the completion costs of said Treasure Well No. 8 [78] as hereinafter in said first affirmative defense alleged.

Further answering Paragraph III of said second cause of action these defendants deny, and each of them denies, that under the clause of said contract of April 5, 1938, quoted in said paragraph, or under said contract, the plaintiffs were not required to raise or invest any moneys for the completion of Treasure Well No. 8, and in this respect allege that the said plaintiffs were required to furnish all the money necessary to complete Treasure Well No. 8 by the terms of said contract of April 5, 1938, and under the terms of said written agreement of November 2, 1938, as hereinafter alleged in defendants' first affirmative defense to the said second cause of action.

IV.

Answering Paragraph IV of said second cause of action these defendants deny, and each of them denies, that they, or either of them, were required to put up or raise any money for the purpose of putting Treasure Well No. 8 on production, and allege that the plaintiffs herein were, and each of them was, obligated and required by the terms of said agreements of September 5, 1938, and November 2, 1938, to put up and raise all money necessary to put said well on production, and any moneys raised or put up by the plaintiffs, or either of them, as alleged in said Paragraph IV, were raised and put up under the terms and conditions of said agreements of April 5, 1938, and November 2, 1938; further answering said Paragraph IV these defendants deny, and each of them denies, that either plaintiff raised or put up $13,000.00, or any part

thereof, excepting only the sum of $11,500.00, advanced by the plaintiffs, as hereinafter in defendants' first affirmative defense alleged.

V.

Answering Paragraph V of said second cause of action these defendants deny, and each of them denies, that plaintiffs herein, or either of them, between May 8, 1938, and December 23, 1938, or at any time, advanced or paid into the Treasure Well No. 8 project, or [79] for the use or benefit of these defendants, or either of them, or for said Treasure Well No. 8, the sum of $13,000.00, or any part thereof, or any sum of money whatever, upon condition that there was to be returned to the said Walter B. Scoville, or to either of said plaintiffs, the sum of two dollars, or any sum, for every one dollar advanced by plaintiffs, or either of them, out of the production of oil or gas from said Treasure Well No. 8 after the payment of operating expenses, or other completion costs, or that any such repayment was to be made from any source; that these defendants deny, and each of them denies, that they, or either of them, ever accepted any money from plaintiffs, or either of them, or from any one, upon condition that it be repaid two dollars for one dollar, and these defendants further deny, and each of them denies, that they, or either of them, ever agreed to repay to the said Walter B. Scoville, or to either of said plaintiffs, the sum of $13,000.00, or any part thereof, two for one, or the said sum of $13,000.00, or any part thereof at all; deny that

there was no other written agreement pertaining to said $13,000.00 or pertaining to the moneys advanced for the completion of the well, but allege that the sum of $11,500.00 was paid in part payment of the cost of completion of said well, under the terms set forth in the contract of April 5, 1938, and the contract of November 2, 1938, as particularly set forth in defendants' first affirmative defense to said second cause of action.

VI.

Answering Paragraph VI of said second cause of action, these defendants deny, and each of them denies, that the plaintiffs, or either of them, advanced the sum of $13,000.00 to or for said well, or any part thereof, except only $11,500.00 advanced as alleged in defendants' first affirmative defense to the second cause of action; admit that no part of said $11,500.00 has been repaid, and deny that it ever was to be repaid. [80]

VII.

Answering Paragraph VII of said second cause of action these defendants deny, and each of them denies, that the Superior Court in said Action No. 441484 excepted from its decree in said action payments of completion costs which were paid with money advanced by plaintiffs, or either of them, and allege that by said decree, and by the stipulation mentioned in said cause of action, merely the issue as to plaintiffs' claim for reimbursement for an alleged $13,000.00 was excepted or reserved from said decree.

VIII.

Answering Paragraph VIII of said second cause of action these defendants deny, and each of them denies, that an accounting of the receipts or expenditures of said well since December 31, 1939, is necessary to ascertain whether since said date there have been sufficient funds in addition to necessary operating or completion costs of said well to repay to the said Walter B. Scoville, or to any one, the sum of $13,000.00, or any part thereof, or any sum, on the basis of two for one, or on any basis at all.

First Separate and Affirmative Defense to the Second Cause of Action.

I.

On and prior to April 5, 1938, defendant Treasure Company was the owner and holder of certain oil and gas leases in Playa Del Rey Oil Field, Los Angeles County, California, including a certain lease known as the Fletcher lease upon which said defendant had a partly completed oil and gas well known as Treasure No. 8, herein designated as Treasure Well No. 8.

II.

At said time defendant Treasure Company was without money or means to complete said well and required certain financing in connection with the completion of said well and the carrying out of a [81] drilling program on other oil and gas leases situated in said Playa Del Rey Oil Field and belonging to said defendant.

III.

On or about April 5, 1938, said defendant and plaintiffs herein entered into a written contract providing for the furnishing of money for such drilling program and fixing the rights and liabilities of the parties thereto. That a copy of said contract is annexed to this answer and marked Exhibit A, and is hereby made a part hereof, with the same force and effect as if herein set forth in full.

IV.

Under the terms of said contract, The Adamant Company, a corporation, plaintiff herein, was granted a twenty-five per cent participating royalty interest in the leases desribed there, under its terms and conditions, and particularly the lease upon which the said Treasure Well No. 8 was and is situated. That Walter B. Scoville, plaintiff herein, by its terms was also granted a nineteen per cent participating royalty interest in said lease, under the terms and conditions of said contract. The Corporation Commissioner of the State of California issued a permit approving the issuance and granting of said participating royalty interests, said interest, by the terms of the permit, to be held in escrow with the Commissioner of Corporations of the State of California.

V.

After the execution of said contract of April 5, 1938, the said Treasure Well No. 8, under the terms of said contract, was drilled to a depth of approxi-

mately 6510 feet by May 29, 1938, and during said time had passed through certain oil bearing sands. That at said time drilling of said well was discontinued, although at said time the parties to this action were of the opinion that said well would be a large producer of oil and gas.

VI.

The said contract of April 5, 1938, provides in part as [82] follows:

"Whereas, First Party now desires to complete said well on the Fletcher lease and Burns No. 1 lease and to drill a second well on Burns No. 2 lease and its third well on Burns No. 3 lease, and will require certain financing in connection with this program; and * * *

"When the first well has been drilled to the basement the parties hereto agree to cooperate in obtaining the necessary casing and other completion equipment and material on credit or in connection with production contracts, or otherwise. If necessary, all monies payable on the royalties to be issued to Second and Third Parties, and the interest retained by First Party, after payment of operating expenses, shall be made available to pay for such completion cost."

VII.

In the month of May or early in June, 1938, various sums of money were due others in connection with the drilling of said well and plaintiffs failed and refused to advance money for such purpose;

that at said time a disagreement occurred between plaintiffs herein and defendant Treasure Company as to the meaning of said contract of April 5, 1938, and as to whether plaintiffs and said defendant would be required, under said agreement, to raise the money between them, and stand the cost of completing said well and putting it on production, or whether the second and third parties to said contract, plaintiffs herein, were required to raise and to pay said money for such completion; that a controversy also at said time arose as to the parties who would supervise the completion of said well.

VIII.

The plaintiffs herein refused to advance the money necessary to complete said well, and put it on production, and insisted that they had the right to designate the person or persons who would supervise the completion of the well, in the event funds were made [83] available for such purpose. That defendant Treasure Company insisted that said plaintiffs provide the money for the completion and placing of said well on production, and that a person agreeable to it be in charge of the completion of the well. That thereupon, upon plaintiffs' failure to advance said money, Treasure Company served notice of termination of all the rights of the plaintiffs in said leases and under said contract, on the ground that they and each of them had failed to perform their part of said contract and had forfeited all rights in said leases and under said contract, by reason thereof.

IX.

On September 16, 1938, The Adamant Company, a corporation, and Walter B. Scoville, plaintiffs herein, after the service of the said notice of default and for termination, instituted a certain action against Treasure Oil Co., Ltd., a corporation, and G. de Bretteville, being Action No. 432115 in the Superior Court of the State of California, in and for the County of Los Angeles, in which complaint it was alleged that Treasure Oil Co., Ltd., was sometimes known as Treasure Company. Plaintiffs in said action sought declaratory relief, and alleged that a controversy existed between the parties to said action concerning the construction of said contract and the rights and duties of the parties thereto, and as to whether the plaintiffs therein were required to furnish all funds or credit for the completion of said Treasure Well No. 8, or whether such duty devolved upon plaintiffs and defendants in said action, and as to whether Treasure Company could rescind or terminate said contract, as well as to the amount of royalty owned by plaintiffs. Defendants herein filed an answer thereto admitting said controversy existed and setting forth the claims of Treasure Company. That as a result of said controversy said well was not completed or placed in operation and mud was pumped into said well in the latter part of April or early May, 1938, where it remained until November, 1938. [84]

X.

On or about November 2, 1938, plaintiffs herein

agreed in writing to furnish the money necessary to complete said well, upon condition that the notice of default and termination served by Treasure Company be withdrawn; that plaintiffs herein be restored to all their rights under the contract, and that Oliver Maze be employed as the superintendent in charge of the completion of said Treasure Well No. 8. That said plaintiffs at said time further agreed to and did dismiss said Action No. 432115. That defendant Treasure Company in consideration of said promise, agreed to restore plaintiffs to all their rights under said contract and consented to said Oliver Maze being superintendent for the completion of said well, and consented to the dismissal of said action, upon plaintiffs' promise to provide the money necessary to complete said well, and, thereupon, in consideration of such promises on the part of plaintiffs to furnish said money, relieved said plaintiffs from default under said contract, and restored them to their rights thereunder. A copy of said written agreement of November 2, 1938, is attached hereto as Exhibit H and by this reference made a part hereof.

XI.

Thereupon pursuant to said agreement plaintiffs furnished $5,000.00 to enable work to be started and said Oliver Maze was placed in charge of said well as superintendent and continued in such position until on or about December 15, 1938, during all of said time being in actual charge of the drilling and completion of said well. That the $5,000.00 so fur-

nished was secured by plaintiff Walter B. Scoville through selling and assigning to Herschel Bullen and Mary S. Bullen, his wife, and J. C. Hayward and Marian S. Hayward, his wife, two of the nineteen one per cents granted to him under the permit of the Corporation Commissioner of the State of California, and defendants are informed and believe and upon such information and belief allege that said $5,000.00 was obtained pursuant to a written agreement [85] between the said Herschel Bullen and Mary Bullen, J. C. Hayward and Marian S. Hayward, on the one side, and the plaintiffs herein, Walter B. Scoville and The Adamant Company, and The Walter B. Scoville Company, on the other side, made and entered into by said parties on or about September 27, 1938, wherein and whereby the said plaintiffs agreed to cause two one per cent participating royalty interests in the leases described in said agreement of April 5, 1938, to be transferred to the said Herschel Bullen and Mary Bullen and J. C. Hayward and Marian S. Hayward, who therein and thereby agreed to advance to the said plaintiffs the said sum of $5,000.00, and that by said agreement of September 27, 1938, the said plaintiffs and the said Walter B. Scoville Company agreed to repay to said persons said $5,000.00, two for one out of the first fifteen per cent of gross production of said Treasure Well No. 8. A copy of said agreement of September 27, 1938, is attached hereto as Exhibit I and by this reference made a part hereof.

XII.

On or about November 2, 1938, as a part of the settlement of the controversy between the parties hereto, by an instrument executed and delivered by plaintiffs on such date, but which instrument was dated June 23, 1938, one J. Orville Seeple was constituted managing agent for plaintiffs in said drilling program, described in said contract, and Harry Wynn was thereafter constituted and appointed a member of such executive committee, the other members being G. de Bretteville and J. Orville Seeple. That a copy of said agreement is hereto annexed and attached, marked Exhibit B and made a part hereof. Immediately after executing said agreement said Harry Wynn signed and delivered to Treasure Company his resignation as a member of said committee.

XIII.

That J. Orville Seeple and Harry Wynn, as members of said executive committee, with the consent and approval of plaintiffs, and [86] to the exclusion of G. de Bretteville, and against the will of Treasure Company, took over the completion of said Treasure Well No. 8, on or about November 2, 1938, and the said superintendent Oliver Maze worked directly under their direction until on or about December 15, 1938. That on said date plaintiffs abandoned said Treasure Well No. 8, and defendant Treasure Company took over the management and control thereof and has continued in possession and control thereof until this date; plaintiffs leaving

approximately $30,000 in debts against said well which Treasure Company was forced to pay.

XIV.

That notwithstanding their promise to furnish the money necessary to complete said well, said plaintiffs failed and refused to do so, save and except that plaintiffs furnished the sum of $11,500.00, (which included the aforesaid $5,000.00) and no more, for the purpose of completing said well and placing it on production. The said $11,500.00 advanced by the plaintiffs, as aforesaid, was merely a part of the purchase price paid for the interests of the plaintiffs in said Treasure Well No. 8 and they should not be repaid the whole or any part thereof by these defendants, or either of them, or from the production of said well.

Second Separate and Affirmative Defense to the Second Cause of Action.

I.

These defendants refer to their first separate and affirmative defense to the said second cause of action, and by this reference here repeat and replead each and every allegation, denial and admission therein contained.

II.

On or about the 17th day of June, 1938, in order to obtain capital to finance the completion of said Treasure Well No. 8, the plaintiffs induced one Spencer L. Halverson to guarantee in writing the

purchase price of casing placed in said well and purchased from [87] Oil Tools Corporation by plaintiffs, said purchase price then being $15,000.00, with a down payment of $2,500.00, which plaintiffs herein had agreed to pay. A copy of said written guaranty agreement is attached hereto as Exhibit J, and by this reference made a part hereof.

Notwithstanding the obligation of plaintiffs, and their promise to furnish all money necessary to complete said well and place it on production, the plaintiffs, and each of them, failed to pay said down payment of $2,500.00 to the said Oil Tools Corporation and the said Spencer L. Halverson became obligated to pay, and paid said sum of $2,500.00 to Oil Tools Corporation.

Thereafter, on July 25, 1940, the said Spencer L. Halverson caused an action to be commenced in the Superior Court of the State of California, in and for the County of Los Angeles, entitled: Selegna Petroleum Corporation, a corporation, and Spencer L. Halverson, Trustee, vs. Walter B. Scoville, The Adamant Company, a corporation, and others, including the defendant Treasure Company, defendants, and numbered 454440 in the files of said court, wherein judgment was sought against the defendants therein named in the sum of $2,500.00 for said sum advanced by the said Spencer L. Halverson, as aforesaid, and also sought to recover the sum of $10,000.00 from The Adamant Company, Walter B. Scoville and The Walter B. Scoville Company, and Treasure Company. By reason of said action it became necessary for the defendant Treasure

Company to employ the said Henry G. Bodkin as its attorney to defend said action and as a result the defendants have incurred a reasonable attorney's fee for such services, as well as costs incurred in said case. Said attorney's fee and costs are proper charges against the plaintiffs' interests in said Treasure Well No. 8.

By stipulation between the plaintiffs herein and Treasure Company and the plaintiffs in said Action No. 454440, a judgment was rendered therein against plaintiffs herein and the defendant Treasure Company for the sum of $2,500.00 without interest or costs, which said [88] sum of $2,500.00 was paid by Treasure Company out of the production of said Treasure Well No. 8. In said action it was expressly stipulated and agreed by and between the plaintiffs herein and the defendant Treasure Company that the question as to which of said defendants in said Superior Court action was chargeable with said sum of $2,500.00 was left open and undetermined to be thereafter determined. Said $2,500.00 paid by Treasure Company, as aforesaid, is a part of the $13,000.00 which plaintiff seeks to recover from defendants in their said second cause of action. The plaintiffs herein are chargeable with the whole of said sum of $2,500.00 because of their promise to furnish all money to complete said well and place it on production, and said sum is a proper charge against plaintiffs' interests in said well.

Third Separate and Affirmative Defense to the Second Cause of Action.

I.

These defendants refer to the allegations contained in their second separate and affirmative defense in this answer, and by this reference repeat and replead each and every allegation therein contained.

II.

These defendants refer to the allegations contained in Paragraph II, Subdivision (g-2) of their first separate and affirmative defense in this answer and by this reference repeat and replead each and every allegation therein contained.

III.

By reason of the foregoing there is pending, and was pending at the time this action was commenced, another action, said Bullen and Hayward Action No. 447435 in the Superior Court of the State of California, in and for the County of Los Angeles, wherein the plaintiffs therein seek to recover from the plaintiffs herein and the defendants herein, [89] a portion of the money claimed by the said plaintiffs in said second cause of action, to wit, $10,000.00, being the $5,000.00 advanced by the said Bullen and Hayward to the plaintiffs herein, as aforesaid, to be repaid on the basis of two dollars for one dollar.

IV.

As long as said Action No. 447435 is pending and undetermined this action should not proceed as to said $5,000.00, or said plaintiffs in said Action No. 447435 should be made parties hereto.

Fourth Separate and Affirmative Defense to the Second Cause of Action.

I.

The cause of action stated in the second cause of action in said second amended and supplemental complaint is barred by the provisions of Subdivision (1) of Section 339 of the Code of Civil Procedure of the State of California.

Fifth Separate and Affirmative Defense to the Second Cause of Action.

I.

The cause of action stated in the second cause of action in said second amended and supplemental complaint is barred by the provisions of Section 343 of the Code of Civil Procedure of the State of California.

Wherefore, the defendants pray for judgment as follows:

1. That said causes of action, and each of them, be dismissed as to these defendants, and each of them, and they be given their costs incurred herein;

2. That it be adjudged and decreed that plaintiffs are not entitled to an accounting and that the accounts heretofore filed herein and presented to plaintiffs, be adjudged full and complete accounts;

3. That if an accounting be adjudged necessary, it be adjudged that all expenditures made and expenses incurred by the defendant Treasure Company in connection with the production of said Treasure Well No. 8, and in connection with the litigation hereinabove mentioned were and are

proper charges against said well, as shown by the books of Treasure Company, and that plaintiffs are chargeable with their proportionate share thereof; and that plaintiffs be charged with those items which defendant Treasure Company has charged against them on its books, and which defendants have herein alleged should be charged against plaintiffs;

4. That if said claim for $13,000.00, or any part thereof be adjudged not barred by the Statute of Limitation, that the portion thereof which may be allowed as a charge against said well be charged against plaintiffs' interest therein;

5. That the attorney's fees and other costs incurred in this case on behalf of defendants be allowed as a charge against said Treasure Well No. 8, and against plaintiffs' interests therein;

6. For such other and further relief as may be proper, and for costs of suit.

Dated: April 18, 1945.

BODKIN, BRESLIN & LUDDY,
/s/ By HENRY G. BODKIN,
Attorneys for Defendants. [91]

EXHIBIT "A"

AGREEMENT

This Agreement, made this 5th day of April, 1938, between Treasure Company, First Party, The Adamant Company, Second Party, and Walter B. Scoville, Third Party,

Witnesseth:

Whereas, First Party is the owner of an Oil and Gas Lease, dated March 11, 1935, from Edwin M. Fletcher, Jr. and Mary A. Fletcher, his wife, to Treasure Oil Company, Ltd., covering Lots Nine (9), Ten (10) and Eleven (11), Block 33, Tract 9809, as recorded in Book 145, Page 91 et seq. of Maps, records of Los Angeles County, State of California; and

Whereas, an incompleted well has been drilled to a depth of five thousand feet (5,000') on Lot Nine (9), above mentioned; and

Whereas, First Party has acquired an Oil and Gas Sub-lease from Robert S. Burns and Sarane Otis Burns, his wife, covering Lots Seven (7), Eight (8), Thirty-five (35) and Thirty-six (36) in the above described Block and Tract, which said Sublease it is proposed to combine with the above mentioned Fletcher lease into one drillsite; and

Whereas, First Party has acquired from said Robert S. Burns and wife another Sublease hereinafter referred to as "Burns lease No. 2" and covering the following described property:

Said property is located in the County of Los Angeles, State of California, more particularly described as: Lots One (1) to Five (5), both inclusive, Lots Thirty-eight (38) to Forty-two (42), both inclusive, in Block 33; Lots Ten (10) to Fifteen (15), both inclusive and Lots Fifty (50) to Fifty-five (55), both inclusive, in Block 34; Lots Ten (10) to Fifteen (15), both inclusive, Lots Seventy-one (71) to Seventy-six (76), both inclusive, in Block 36, all

in Tract 9809, [92] as per map recorded in Book 145, Pages 91 et seq. of Maps, in the office of the County Recorder of said County; and

Whereas, First Party has acquired another Sublease from Robert S. Burns and wife, hereinafter referred to as "Burns lease No. 3" and covering the following described property, located in Los Angeles County, California:

Lots Six (6), Thirteen (13), Fourteen (14), Fifteen (15), and Twenty-six (26) to Thirty-four (34), both inclusive, and Lot Thirty-seven (37) Block 33; Lots Sixteen (16) to Twenty-six both inclusive, and Lots Thirty-nine (39), Forty (40) and Forty-two (42) to Forty-nine (49), both inclusive in Block 34; Lots Sixteen (16) to Twenty-four (24) both inclusive, Lots Twenty-six (26) and Sixty-one (61) to Seventy (70), both inclusive in Block 36, all in Tract 9809, as per map recorded in Book 145, Pages 91 et seq., of Maps, in the office of the County Recorder of said County; and

Whereas, First Party now desires to complete said well on the Fletcher lease and Burns No. 1 lease and to drill a second well on Burns No. 2 lease and its third well on Burns No. 3 lease, and will require certain financing in connection with this program; and

Whereas, Second Party desires to obtain an interest in said property and to furnish working capital to the extent of Ten Thousand Dollars ($10,000.00) for the purpose of carrying the above program into effect; and

Whereas, Third Party has rendered extensive services in working out this agreement and expects to assist in carrying out the above described drilling program,

Now, Therefore, in consideration of the premises and the [93] several undertakings hereinafter set forth, the parties to this Agreement hereby mutually agree as follows:

1. The execution of this Agreement and the operations thereunder are wholly conditioned upon the issuance by the Commissioner of Corporations of a permit authorizing the participating royalty interests hereinafter described.

2. First Party agrees to file and prosecute an application with the Commissioner of Corporations for such a permit immediately upon the execution of this contract.

3. First Party has arranged for the use of the derrick, rotary drilling outfit, tools, drill pipe, pumps, etc., now located on the Fletcher property, as well as certain drill pipe and other equipment located near Bakersfield, and First Party hereby agrees that all of such equipment shall be available for use in connection with the above drilling program.

4. Second Party agrees to advance, upon the issuance of the above mentioned permit, the sum of Ten Thousand Dollars ($10,000.00) to First Party to be used solely and exclusively for the purpose of deepening and completing the well on the Fletcher lease. Said funds shall be carried in a special bank account of Treasure Company, and all

checks thereon are to be jointly signed by said Treasure Company and J. Orville Seeple, of Los Angles, California.

5. Upon the issuance of said permit and as consideration for said sum of Ten Thousand Dollars ($10,000.00) First Party agrees to issue participating royalty interests to the Second and Third Parties as follows:

(a) To Second Party a twenty-five percent (25%) participating royalty interest on all of the above described leases.

(b) To Third Party a participating royalty interest of nineteen percent (19%) in the Fletcher and Burns No. 1 lease if the well is completed for [94] less than one thousand (1,000) barrels, which said royalty shall be reduced to sixteen and one-half percent (16½%) if said well is capable of producing one thousand (1,000) barrels or more per day upon completion; eighteen and one-sixth percent (18-1/6%) participating royalty interest in Burns No. 2 lease; and eighteen and one-sixth percent (18-1/6%) participating royalty interest in Burns No. 3 lease.

It is understood that after providing for landowner and overriding royalties, the issuances of the participating royalties above set forth, and certain other minor issuances, which will be requested in said application for permit, First Party will have remaining approximately twenty-five percent (25%) of any production which may be obtained from the above leases.

6. It is agreed that the royalty interests to be is-

sued to Second and Third Parties shall be issued into escrow and remain in escrow at least until the completion of the above described drilling program, and that such intention and desires shall be affirmatively expressed in the above mentioned application for permit.

7. It is understood that the participating royalties to be issued to Second and Third Parties, together with the interest remaining in First Party after all of the issuances hereinabove mentioned, shall be subject to their prorata share of all operating and maintenance charges on the first and any succeeding wells. As to the minor issuances above mentioned, it is understood that five percent (5%) in all of the leases and one percent (1%) in the first well shall bear their prorata share of operating and maintenance expenses, but not to exceed Ten Dollars ($10.00) per month per well for each one percent (1%). [95]

When the first well has been drilled to the basement the parties hereto agree to cooperate in obtaining the necessary casing and other completion equipment and material on credit or in connection with production contracts, or otherwise. If necessary, all monies payable on the royalties to be issued to Second and Third parties, and the interest retained by First Party, after payment of operating expenses, shall be made available to pay for such completion costs. It is agreed, that should Second Party and Third Party decide, after the first well has been drilled to the basement schist, that they do not desire to proceed further, this

contract shall then be terminated and they will quitclaim to First Party all of the interests to be received by them hereunder, except one-third (⅓) of their interests in the first well. It is also understood that should the first well be completed for two hundred (200) barrels per day or less, this contract shall terminate, and Second Party and Third Party will thereupon quitclaim to First Party all of their interests hereunder, except as to such first well.

After such completion costs have been paid, then one-half (½) of the net sum payable to Second and Third Parties on account of such royalties, and one-half (½) of the sum accruing to First Party by reason of its remaining interest shall be impounded in a special fund for the sole and exclusive purpose of defraying the drilling and completing costs of a second well.

After the second well has been completed and paid for, then a similar impound from the same source shall be accumulated to cover the cost of drilling and completing a third well. After the third well has been completed and paid for, then the respective interests of the parties hereto shall be subject only to the necessary expenses incident to the operating, maintenance and repairing of said wells. If any further wells are to be drilled on Burns Lease No. 2 or Burns lease No. 3, the financing thereof shall be arranged by subsequent agreement between the parties. [96]

It is agreed that first party shall receive Five Thousand Dollars ($5,000.00) for the use of its

drilling equipment on each well, except the first well, and that such amount shall be accumulated in each of the above mentioned drilling funds for the second and third wells.

8. It is understood that the royalties herein provided and to be issued to Second Party and Third Party are not for distribution, and that they are to remain in escrow until the above described three well program has been completed, or until the parties agree upon an earlier termination of the drilling program. In any event, they shall remain in escrow until released by the Commissioner of Corporations. While such royalty interests are in escrow, Second Party and Third Party agree to make no transfers thereof or therefrom without the written consent of the Commissioner of Corporations.

J. Orville Seeple, on behalf of Second Party and Third Party, and G. DeBretteville, on behalf of First Party, shall form an executive committee to have joint control and advisory powers with respect to all drilling and producing operations hereunder. No purchases shall be made on credit and no expenditures or other obligations incurred without the joint approval of both members of said committee.

In Witness Whereof the parties hereto have duly executed this agreement the day and year first above written.

Treasure Company,
By G. deBretteville

The Adamant Company,
By Helen Scoville, Sect'y.
Second Party
Walter B. Scoville,
Third Party [97]

* * * * *

EXHIBIT "H"

[Halverson & Halverson, Lawyers, Letterhead]

The Treasure Company November 2, 1938
2600 Washington Blvd., Venice, California.

Gentlemen:

The undersigned, for and on behalf of the Adamant Company, Walter B. Scoville, and himself, hereby agrees that Oliver Maze shall be employed as Drilling Superintendent and Tool Pusher in connection with the completion of the Treasure Well, now being drilled on Lot 9, Block 33, Tract 9809, Del Rey Hills, California, and we will assure you the necessary funds will be forthcoming to complete said well.

Yours very truly,

J. Orville Seeple
Walter B. Scoville,
By J. Orville Seeple, His Agent
The Adamant Company
By J. Orville Seeple, Its Agent [144]

* * * * *

Duly Verified.

Acknowledgment of Service attached. [153]

[Endorsed]: Filed April 19, 1945.

[Title of District Court and Cause.]

REPORT OF SPECIAL MASTER

Your special master herein was appointed by an order entered April 16, 1946, which directed him to take testimony and make findings of fact as to each of the items in issue respecting the following questions:

(a) With respect to each item listed in the Second Amended Complaint herein, beginning at line 22, page 6 thereof, and continuing on pages 6 to 19 thereof, both inclusive thereof, to line 26, page 19 thereof, the person, firm or corporation to whom each expenditure was paid and whether or not each recipient of a payment actually received the money, and what said recipient gave in return therefor.

(b) Whether, in case of each of said items, the [158] material purchased or service paid for was used in, upon or for said Treasure Well No. 8, and

(c) Whether, in case of each of said items the price paid for the material purchased or service paid for, was the reasonable value of such material or service, at or about the time the material was purchased or service rendered in the area in which such material was purchased or service was rendered.

The Parties and the Issues:

The plaintiffs are Walter D. Scoville, a resident of the state of Utah, and the Adamant Corporation, a Utah corporation, and defendants are the

Treasure Company, a California corporation, and Guy de Bretteville, the president and manager thereof, a resident of California.

The controversy arises from the operation of an oil and gas well known as Treasure Well No. 8 in Los Angeles County on property described as follows: Lots 9, 10, 11 of Block 30, Tract 9809 as per map recorded in Book 145, Page 91 et seq. map records of Los Angeles County, California. The property was taken in a condemnation suit by the United States on September 28, 1942.

The plaintiffs' first cause of action is for an accounting by the defendants of their operation of Treasure Well No. 8 from December, 1939, to November, 1943. The Second Amended Complaint sets out at pages 6-19 many items which they call upon the defendants to justify. The defendants in their answer deny in a great part that these are improper charges and that many issues of fact are res judicata by reason of a judgment entered in Scoville et al., vs. de Bretteville et al., No. 441, 484 in the Superior Court of the State of California, in and for the County of Los Angeles, affirmed in the case of the same name, 50 Cal. App. (2nd) 622. [159]

The file in this case shows that an audit was made, pursuant to an order of the District Court, by Irwin Lampe, an associate of Claude I. Parker. It is evident that this audit which covered a month to month record of receipts and disbursement of the defendant corporation was the basis of plaintiffs' pleadings of p. 6-19 of their second amended complaint, the effect of which is to put in issue all

disbursements made by the defendants as shows by that audit.

Your special master met with the parties and their counsel in an effort to reduce and clarify the matters in issue. This resulted in an order directing the defendants to bring in an account in writing of all receipts and disbursements and to produce their books, records, and vouchers for examination. An account prepared by Gerald E. Moore, defendant's auditor, was filed. Mr. Moore was produced as a witness for examination. The books and records produced by the defendants were made available in the office of the special master for examination by the plaintiffs. By order of the special master, the plaintiffs filed written objections to the Moore audit. Upon this audit and plaintiffs' objections thereto the issues to be determined in this accounting were drawn. As heretofore stated, these steps were taken for the purpose of reducing and clarifying the number of items in dispute. However, the results were disappointing. The defendant's objections to the account covered practically all items of expenditure. By a later stipulation the accounting was limited to the period from December, 1939, to September 28, 1942, which latter date was the time of seizure by the United States.

Thereafter the matter was set down for the taking of testimony and beginning December 10, 1946, and continuing thereafter with occasional adjournments to January 9, 1947, evidence both oral and documentary was received. Subsequently briefs were filed by the parties and the matter submitted.

Plaintiffs state their objections under 21 headings. Hereafter these objections will be considered in the order adopted by the plaintiffs with some variations in the interest of convenience.

Res Judicata

On this general issue the following findings are made:

(1) That on June 1, 1939, an action was filed in the Superior Court in and for the County of Los Angeles by Walter B. Scoville, J. O. Seeple, Harry Wynn and the Adamant Corp., against G. de Bretteville and Treasure Company, a corporation, for an accounting, injunction and the appointment of a receiver which case is No. 441, 484 in that court. An answer was filed. The parties of the same name in this action are identical with the parties to that action. The case was tried without a jury, Findings of Fact and Conclusions of Law were made by the court and a Judgment entered. This judgment was affirmed upon appeal by the District Court of Appeal and is now final.

(2) That the accounting prayed for in the said action concerned the operation of Treasure Well No. 8, which was located on a leasehold on the property described as Lots 9, 10 and 11 of Block 33, Tract 9809, Los Angeles County which is the subject matter of the accounting in the instant case.

(3) That in the said action in the Superior Court an accounting was had of the operation of the said well for the period April 5, 1938 to December 31, 1939.

That upon the issues involved in said accounting the Superior Court made the following findings:

"That for the period from December 16, 1938, to and including December 31, 1939, said defendant G. de Bretteville, acting on behalf of the defendant Treasure Company, was constantly supervising said well and the production thereof; that under his management the production of said well was increased and has not substantially declined therefrom; that he supervised the selling [161] of the oil, gas and gasoline produced from said well and secured the best possible price for said products; that said defendant G. de Bretteville, by his manner of production and operation increased the gravity of said oil and produced said well at its maximum capacity and his said acts in so doing were in accord with the general oil field practice; that it was necessary that said well have a manager and supervision and the sum of $250.00 a month is, and at all times during which said services were performed were, a reasonable amount to be allowed said defendant G. de Bretteville for his services as supervisor and manager of said Well No. 8."

"That Court finds that it was necessary, proper and in accordance with good oil field practice to have three men, other than the manager, each working eight hour shifts to produce said well so that one employee will be at said well at all times; that as shown by said account prepared by Eugene M. Berger, the sum of $500.00 a month has been paid as salary to said three men since December 16, 1938, for operating said well "Treasure No. 8", and

the Court finds that such expenditures were proper, necessary and reasonable, and allows the said expenditure and the whole thereof as a charge against said Well No. 8."

"That the sum of $29.00 a month was paid by the defendant Treasure Company for office help during the period from January 1, 1939, to and including July 31, 1939; the Court finds that said sum of $29.00 a month is and was reasonable and that said expenditure was necessary in the operation of said well and is allowed in the full amount; that the sum of $37.50 a month was paid by the defendant Treasure Company for office help during the period from August 1, 1939, to and including December 31, 1939; the Court finds that the sum of $25.00 was a reasonable amount to pay for such office help during said period and that it was a necessary expense and properly chargeable against said well."

It was further found by the Superior Court that of a total of $735.77 charged as telephone expenses against the said well the sum of $622.24 was a necessary and reasonable charge.

(4) That during the period of this accounting as compared with the period of accounting in the Superior Court case, there occurred no material changes in the conditions under which the well was operated, other than those attributable to the economic factors brought about by World War II, and reflected in scarcities of labor and materials.

(5) That during the period of this accounting as compared with the period of accounting in the Superior Court case the same method of operation

and management of Treasure Well No. 8 were carried on by the defendants, and the production from the said well was of comparable quantity and quality.

(6) That concerning the contract dated April 5, 1938, out of which that action and the instant suit arose, the Superior Court found:

"That the contract dated April 5, 1938, a copy of which is attached to defendants' answer, and the addendum thereto, a copy of which is set forth in plaintiffs' complaint, were terminated as of January 31, 1939, save and except that the plaintiffs, The Adamant Company and Walter B. Scoville and their assigns, are entitled to retain their respective interests in said lease hereinbefore described upon which said well "Treasure No. 8" is drilled, to-wit, twenty-five per cent (25%) therein to The Adamant Company, a corporation, and nineteen per cent (19%) therein to Walter B. Scoville, both of which interests are subject to any assignments made and subject to their pro rata share of the completion, operating, and maintenance costs and charges of said well."

Conclusions

There is identity of parties and issues in this action [163] and the Superior Court action. The judgment in the prior case clearly estops the plaintiffs from relitigating the essential matters decided in that case. Williams vs. Hawkins 34 Cal. App. 146. Sutphin vs. Speik 15 Cal. (2) 195. The doctrine of res judicata will not be applied to prevent a

reexamination of the same question where in the interval between the two actions the facts have materially changed so as to alter the legal rights of the litigants. Hurd vs. Albert 214 Cal. 15, 76 A.L.R. 1348. Inasmuch as the accounting periods in the two actions differ it has been necessary to examine the prior case to determine whether or not there are material changes in the factual situation such as would alter the rights of the parties.

As to the broader issues involved, such as the manner in which the well was managed and the nature and value of defendant de Bretteville's services, there is no change in the factual situation. The evidence in both cases is similar and there is identity of witnesses and testimony on many points. Upon a review the evidence in this case would support the findings and judgment made by the Superior Court. This is not to say that the evidence herein would not support findings less favorable to the defendants. In making findings herein the master has based findings on certain issues solely upon the doctrine of res judicata. It will be indicated hereafter which findings are made upon that doctrine.

Objection I.

Salary paid to defendant de Bretteville.

The master finds that this issue was determined in the Superior Court action and that the sum of Two Hundred Fifty Dollars a month is the reasonable value of the services rendered by defendant de Bretteville.

Objection II.

The master finds that M. Jones was employed to perform stenographic and clerical services for the operation of Treasure Well No. 8, and that she also performed services for the Samarkand Oil Company and the defendant de Bretteville and that the Superior [164] Court found that for the same services during the period August 1, 1939 to December 31, 1939, that the reasonable wages for her services were Twenty-five Dollars a month.

It is your special master's conclusion that this objection to this charge be sustained as to any amount in excess of $25.00 a month.

Objection XV.

This objection goes to expenditures for office supplies and stationery. The master finds that these charges were reasonable and proper charge against the operation of the well.

Objection XVI.

The master finds that defendant de Bretteville maintained an office from which he transacted the business of operating Treasure Well No. 8 in the house in which he lived but separate from the living quarters of his family and that the charge of $15 a month as rent was a reasonable charge against the operation of the well.

Objection III.

During this accounting period the defendants, Treasure Company and G. de Bretteville were par-

ties defendant in several law suits which directly or indirectly involved Treasure Well No. 8. The expenses of defending these actions, including court costs, attorney's fees, bond premiums, accounting costs, appeal costs and pay of experts, were charged against the operation of Treasure Well No. 8. (Moore Audit, pp E-40, C-41, C-42). Details concerning the defendants position and participation in these actions are found in the testimony of Henry Bodkin (Transcript p. 578 et seq.) The original files of the Superior Court in and for Los Angeles County were before the master during the taking of testimony. Copies of the enrolled papers in each case are in evidence. (Exhibits Q, R, S and T.)

Separate findings and conclusions will be made as to each [165] of these cases, as follows: Scoville et al vs. G. de Bretteville, et al, No. 441, 484 in the Superior Court in and for Los Angeles County.

Findings

That this action is the case referred to above in findings on the issue of res judicata and the findings previously made are incorporated as a part of these findings.

That it appears that a stipulation was entered into that the question of whether or not either party was entitled to attorneys' fees in connection with the preparation and trial of the case should be left for future determination without prejudice (Findings p. 24, Paragraph XXIV, Exhibit Q), but that no mention thereof is made in the Judgment entered in the case.

That the litigation was between parties who were asserting hostile interests and the plaintiffs were asserting a right to possession and operation of the well.

That in the said case the Superior Court allowed charges against the well for the services of guards to prevent the unlawful seizure by the plaintiffs of the property on which the well was located. (Findings p. 20, paragraph XXI (H), Exhibit Q).

That the services of Henry G. Bodkin and his associates were reasonably worth the amount of Twelve Thousand six hundred and Fifty Dollars of which Seven Thousand Dollars has been paid on account and that the other charges incident to the suit were necessary expenses and charges made therefore are reasonable.

Conclusions

The defendants justify these charges on the theory that the defense of this action was necessary to their continued possession and operation of the well under the contract of April 5, 1938, as interpreted by the Superior Court and that as a matter of law a binding precedent is found in the decision of the Superior Court that the cost of protecting the leasehold property [166] by guards was a proper charge against the well.

At best, the defendants' argument can be considered as an attempt to draw an analogy. The protection of property against unlawful trespass and the defense of an action brought in a court of com-

petent jurisdiction to obtain possession, are different things.

The allowance of attorneys' fees in adverse actions in the Superior Court is governed by sec. 1021, Code of Civil Procedure. The whole question turns upon the law as effecting the allowance of attorneys' fees in that action rather than upon rules governing accounting practice. Neither by agreement or by statutory provision are attorneys' fees allowable in the Superior Court action. The law appears to be well settled. Sec. 1021, Code of Civil Procedure, Salmina vs. Juri, 96 Cal. 418, L. A. Trust, etc. vs. Ward 197, Cal. 103, Estate of Marra, 19 Cal. (2) 191, Kahn vs. Smith 23, Cal. (2) 12.

It is the conclusion of the master that the costs of litigation in this Superior Court action are not allowable as charges against the well, except insofar as allowed as costs in the Judgment of the Superior Court. Kier Corporation vs. Treasure Oil Company in the Superior Court in and for Los Angeles County.

Findings

That this action was brought by the plaintiff against the Treasure Oil Company, Ltd. for breach of an oil and gas lease entered into between the plaintiff as lessor and the Treasure Oil Company, Ltd., as lessee, covering land other than that which is the subject of the contract in issue in the instant case; and that this cause of action appears to be based upon the alleged breach of a contract to include the leased land in a community drilling project.

That the Treasure Oil Company, Ltd., was a corporation [167] owned by defendant de Bretteville and members of his family and was the predecessor in interest in and the grantor of title to the lease, here in issue, to the defendant, Treasure Company, and that later in the action the Treasure Company was added as the real party in interest and defended the action.

Conclusion

In this action the Treasure Company and de Bretteville were defending title to their leasehold interest against an action based upon a contract and not upon any matter that appeared in the record chain of title to the leasehold.

In entering into the agreement of April 5, 1938, the defendants warranted by implication that they had good title to the leasehold and the right to contract freely in relation thereto. It follows that the defense of that title is wholly their responsibility. All charges relating to this law suit are disallowed. Herschel Bullin et al vs. Walter B. Scoville, et al, No. 44734 in the Superior Court in and for Los Angeles County.

Findings

That this is an action brought by Bullin and his wife and J. C. Hayward and his wife, upon a contract entered into between them and the Adamant Company and Walter B. Scoville and the Walter B. Scoville Company and that the subject matter of that contract was the royalty interest of Walter B. Scoville and the Adamant Company in Treasure

Well No. 8, and that the Treasure Company and de Bretteville were not parties to the contract but were joined as parties defendant because the plaintiffs claimed an interest under their contract with Scoville and the Adamant Company in funds alleged to be in the hands of the Treasure Company.

That the Treasure Company and de Bretteville filed an answer by their attorney Henry G. Bodkin and that he and his associates have performed services in relation to said action of [168] the value of $1,187.50 and that said action is still pending and undetermined.

Conclusion

The pleadings in this action do not show that de Bretteville and the Treasure Company are hostile litigants in relation to their co-defendants Scoville and the Adamant Company. It follows that the rule applied in the Superior Court case of Scoville vs. de Bretteville does not apply here. Here it is a question of accounting: whether or not the cost of defending this action is a cost properly chargeable to the maintenance and operation of Treasure Well No. 8. It is the master's conclusion that it is a proper charge in that the action arose out of a contract dealing with the proceeds of the well and that the Treasure Company and de Bretteville are under a duty to defend such an action to preserve for proper distribution, funds resulting from the operation of the well, which the Treasure Company held. Selegna Petroleum Corp., et al vs. Walter B. Scoville, et al, No. 45,440 in the Superior Court in and for Los Angeles County.

Findings

That this action was brought by the Selegna Petroleum Company and Spencer L. Halverson, as Trustee, for breach of a contract to save them harmless from a guarantee of the credit of the Treasure Company, that the appearing defendants in the action who were also parties to the contract were Walter B. Scoville and the Adamant Company by Leland J. Allen and the Treasure Company by Bodkin, Breslin and Luddy.

That the action resulted in a stipulated judgment for Twenty-five hundred Dollars with the question of liability as between the defendants undecided.

That the contract from which this action arose was for the purpose of obtaining materials to complete Treasure Well No. 8.

That the reasonable value of the services of counsel in this case is in the amount of $1,412.50, and that accounting costs [169] of the reasonable value of $111.00 are properly chargeable to this action.

Conclusion

This is much the same situation as that in the Bullin & Hayward case except that in this case the Treasure Company was privy to the contract in issue. The controversy arose out of matters relating to the completion and operation of the well and it follows that the law suit expenses are a proper charge against the well.

Objection IV.

This objection goes to the telephone bills charged against the well. Admittedly $358.27 was improp-

erly included in this charge. Objection is sustained in that amount and not sustained as to the remainder.

Objection V.

This objection goes to expense of maintaining and renting automotive equipment. These charges are sustained by evidence. The objection is overruled.

Objection VI.

The items here objected to concern the services of Mr. Gerald E. Moore who audited the books of the company relating to the operation of the well. The charges are reasonable and the work charged for was done. The objection is overruled.

Objection IX.

All items of interest were paid to taxing agencies or upon unpaid balances to suppliers of equipment. Moore Audit, I-40, J-42. These were proper charges and are allowed.

Objection X.

Defendants' auditor admitted that an item of $330.21 or $331.00 charged as an operating expense in 1940 was disallowed by the Internal Revenue Bureau and that they were required to treat it as an addition to capital assets. Transcript P. 50-51.

Defendants' counsel, at a later date, identified this charge as relating to a purchase of sucker rods and pipe. Defendants' Brief P. 41. If that contention is correct this [170] objection should be treated in the same manner as Objection VII.

However, there is a possibility that the proper

reference is to an item of expense involved in the Superior Court action. Exhibit 3, p. 5 of Report of Internal Revenue Agents. If this is the fact, then the matter is covered by the rulings under Objection III.

Objections VIII, XI, XII, XIII, XIV, XVI, XX

These objections go to the actual costs of operating the well — labor, power, supplies and like charges.

Except for the addition of a so-called "gravity retainer" the operation of the well during the period herein questioned was the same as that during the period covered by the Superior Court action. The addition of the gravity retainer may or may not have benefited the well, but in doing so Mr. de Bretteville was acting within the discretion which his responsibility as manager entitled him to exercise. Otherwise the issues raised are controlled by the Superior Court decision. The objections are overruled.

Objection XVII.

This objection goes to charges for insurance. The automobiles used in the operation of Treasure Well No. 8 were not the property of leasehold. They were owned by the Treasure Company or Mr. de Bretteville and during most of this period the well paid for their use on a mileage basis. The insurable interest rested in the owners of the vehicles. In case of loss they and not the well would have been the beneficiaries. The other charges for insurance

related to property on the leasehold. The objection is sustained only insofar as it goes to expenditures for insurance on automotive equipment.

Objection XVIII.

This objection goes to several tax items charged to the operation of the well. [171]

A charge of $100.00 as of January 31, 1940, is admittedly improper. Of this $25.00 is properly chargeable.

Capital stock and franchise taxes, which are presumed to have accrued due to the corporate nature of the Treasure Company, are clearly not properly charged to the operation of the well.

The well owned no automotive equipment, and it follows that license fees and taxes for such are not proper charges.

Formal objection was made to the inclusion of Federal income and excess profits taxes as an operating cost. Upon reading plaintiffs' briefs, the special master felt that counsel had overlooked the implications of several recent decisions that had bearing on the subject. Briefs were called for and subsequently were filed.

At the outset it is observed that the Treasure Company returned the whole of the net income of Well No. 8 and claimed all allowances for depletion.

The nature of the plaintiffs' interest in the production of the well was settled in the Superior Court case. The plaintiffs retained a percentage interest in the lease subject to their pro-rata share of the completion, operating and maintenance costs.

The right to fully control and operate the well went to defendants herein as of January 31, 1939. No trust relationship or association of the kind described in Helvering vs. Combs, 296 U.S. 365, existed after that date if any ever did exist.

The rule laid down in Burton-Sutton Oil Co. vs. Commissioner, 328 U.S. 25, appears to govern the right to claim depletion and the correlary liability for payment of Federal income tax on income from the leasehold in question. In that case the taxpayer had acquired by contract the right to develop and operate a leasehold. It was to pay to the transferor 50% of the net income derived from oil produced after deducting certain specified [172] operating charges. The court held that the right to claim depletion deductions depends upon whether the one claiming such deductions has an economic interest in the production of the well. In the instant case by contract and by the judgment of the Superior Court, the plaintiff's interest in the well is fixed as a percentage of the net profit from the production of Treasure Well No. 8. This is the same factual situation as that found in the Burton-Sutton case, supra, except for this difference—in the Burton-Sutton case, the operating company was the transferee of the rights to operate the leasehold, while in this case, the defendant company had control over the operation of the well during the accounting period and were the transferors of the participating interest. The master can find nothing in the Burton-Sutton Case which gives any significance to this difference.

The disallowance of this item works a hardship on the defendant corporation in that it has paid the tax and cannot at this late date apply for a refund. It can only be said that any taxpayer acts at his own peril, including the risk of a decision of the Supreme Court contrary to a theory, however logical, upon which he has relied.

The master concludes that any payments of Federal income taxes, including excess profits tax, are not a proper charge against the operation of the well.

Social Security taxes were paid on the employees working on the leasehold. This is a proper operating charge.

Objection VII.

The objection under this heading goes to expenditures for casing, tanks, and equipment and seems to be based on an item in The Parker audit which referred to such items as items purchased but not found on the leasehold at the time of that audit. Under objection XXI the plaintiffs make general objection [173] to the alleged failure of defendants to list capital assets. Your special master is confused as to what theory the plaintiffs are presenting. Attention is called to plaintiffs' brief pp 55 and 62 et seq., Transcript p. 27, p. 352-355, p. 1072.

Casing, tanks, sucker rods, pumps and the like, when purchased for use in the operation of an oil well, become capital assets. Under proper accounting practice they are carried as capital assets subject to depreciation. It appears that many items of this character are included in the Moore audit as maintenance and operating expenditures. An

example is found in Schedule C-42. An item of $3,579.96 paid to the General Pipe and Supply Co. was for new casing. This casing was placed on the leasehold and not used prior to the time the well was taken over by the government. It probably became a part of the subject matter of the suit brought against the Union Oil Co. by The Treasure Company which resulted in a judgment in favor of the Treasure Company for the value of all personal property taken by the United States.

In making tax returns The Treasure Company has been required to capitalize some of these expenditures. See Tax Returns. Plaintiffs' Exhibit 3.

Except for certain items such as the aforementioned purchase of casing, there is an insufficient record here to make a satisfactory adjustment of these matters. It is entirely possible that upon the final liquidation of this operation and the division of funds realized from capital assets, this will become a moot question. Eventually there must be a final accounting between the parties. The best course now is to overrule this general objection without prejudice to the consideration of these questions in the adjustment of the parties' interests in the capital assets of the venture. [174]

Objection XIX.

Plaintiffs conceded that the charge of $306.25 was properly made following the order of Judge Vickers in the Superior Court case.

(Note that under this heading plaintiffs have objected to an item of $2,525.19. The master held that

this matter was not before him under the order of reference herein.)

Objection XXI.

Under sub-headings 2, 3, and 4, the plaintiffs put in issue a series of money transactions between defendant de Bretteville and the bank account of Treasure Well No. 8. Mr. de Bretteville feared attachments. He withdrew during 1942 a total of $46,096.29 from the Treasure Well No. 8 bank account. With these funds he purchased cashier's checks, which he redeposited in the account as money was needed for operating expenses. The tracing of these funds has been a long and tortuous process. Although some redeposits were made after the end of the accounting period, all withdrawals were redeposited. This operation may be eliminated from this accounting.

Under sub-heading 1, the plaintiffs question the accounting of the capital assets fund. They contend that many of the charges for supplies should be charged to capital assets rather than operating accounts. Your special master believes that this contention is covered under the headings Objections VII and X.

In 1943, after the end of this accounting period, defendant de Bretteville recovered $1,059.80 representing the sale of chemicals to the Union Oil Co. This transaction is not within the scope of the accounting.

This report in draft form was submitted to counsel for all parties for the purpose of receiving their suggestions for amendment or correction. Sugges-

tions were filed by counsel. The master has reconsidered his report and reached the conclusion [175] that the report should be filed in substantially the form in which it was drafted. The following additional observations were added.

1. The accounting period is limited to those transactions had between December 1939 and September 28, 1942. Only in the matter of tracing the funds withdrawn and held in the form of cashiers checks and then redeposited has the master gone beyond that date. Some redeposits were made after September 28, 1942.

2. This report may be incomplete in that it does not make specific findings on some matters. It is the master's intention to set out his conclusions and explain the theories adopted. Upon this report and any modifications made by the District Court, formal findings may be prepared. Your special master will assist in settling findings if the court directs him to do so.

Your special master has devoted in excess of 28 days to the hearing of this matter and the preparation of his report and requests the court to fix his compensation and order payment thereof.

Returned herewith is the file in the case together with a transcript of the testimony taken, exhibits and papers filed during the course of the reference.

Respectfully submitted,

/s/ DAVID B. HEAD,
Special Master [176]

[Endorsed]: Filed Dec. 8, 1948.

[Title of District Court and Cause.]

MOTION AND NOTICE OF MOTION FOR LEAVE TO INTERVENE

To: The plaintiffs above named and their attorney, Leland J. Allen, Esq.; and the defendants above named and their attorney, Claude A. Ferguson, Esq.:

Please take notice that the undersigned, on behalf of the applicants Herschel Bullen and Mary H. Bullen, his wife, and J. C. Hayward and Marian S. Hayward, his wife, will move this Court, before the Honorable Peirson M. Hall, Judge Presiding, at his Court Room in the Federal Building, 312 North Spring Street, Los Angeles, California, on Monday, the 11th day of August, 1952, at 10 o'clock in the forenoon, or as soon thereafter as counsel can be heard, for [177] leave to intervene in this action on the following grounds:

(1) That the above named applicants are so situated as to be adversely affected by a distribution of property which is in the custody of the Court.

(2) That the applicants' claim and the main action have questions of law and fact in common.

The motion will include a request for leave to file a complaint in intervention substantially in the form of the proposed complaint annexed hereto.

The motion will be based upon this notice, the affidavit of Fulton W. Hoge filed herewith, the files and records of said cause, and, also, the files and records in the case of United States vs. Certain Parcels of Land, No. 2454-B-Civil.

Applicants will rely upon Rule 24 (a) (3) and (b) (2) as authority for said motion.

WILLIAMSON, HOGE & CURRY,
/s/ By FULTON W. HOGE,
Attorneys for the applicants Herschel Bullen and Mary H. Bullen, J. C. Hayward and Marian S. Hayward. [178]

* * * * *

Affidavit of Service by Mail attached. [193]

[Endorsed]: Filed Aug. 7, 1952.

[Title of District Court and Cause.]

OPPOSITION TO MOTION FOR LEAVE TO INTERVENE

To: Herschel Bullen and Mary H. Bullen, J. C. Hayward and Marian S. Hayward, and to Williamson, Hoge and Curry, their attorneys:

Walter Scoville and The Adamant Company, a corporation, oppose the motion to intervene because:

(1) The application is not timely made;

(2) The applicants are not so situated as to be adversely affected by the distribution of cash or property in the custody of the Court;

(3) That the applicant's claim and main action have no questions of law and facts in common with these plaintiffs;

(4) That the statute of limitations of the State

of [201] California has run against the alleged contract dated September 27, 1938 and marked "Exhibit A", attached to applicants' proposed complaint and intervention;

(5) That by failure of applicants to obtain personal service upon Walter B. Scoville in its action filed on April 10, 1940 in the Superior Court of the State of California, in and for the County of Los Angeles, or to faithfully prosecute said action, applicants have no cause of action or right of intervention against Walter B. Scoville;

(6) That in the condemnation action, Case No. 2454-B-Civil of this District Court, applicants took no part in the jury trial of said cause and made no presentation of evidence of their interests before the jury;

(7) That applicants, as owners of 2 per cent working interest in Treasure Well No. 8, have the right to an accounting action against defendants G. de Bretteville and Treasure Company, which is separate and distinct from the cause of action of these plaintiffs;

(8) That any amounts due these applicants by reason of their ownership of working interests in Treasure Well No. 8, are separate and distinct from any amounts due these plaintiffs;

(9) That the statute of limitations has run against any rights of accounting of these applicants against the defendants G. de Bretteville and Treasure Company;

(10) That the United States Court of Appeals of

the Ninth Circuit made no ruling authorizing these applicants to intervene in the instant case;

(11) That the so-called two for one agreement which applicants are attempting to enforce by intervention was held to be a personal matter between these applicants and Walter B. Scoville in the condemnation action;

(12) That the Circuit Court of Appeals was without jurisdiction [202] to in any manner pass upon the issues involved in the instant case;

(13) That the award in the condemnation action was for the ownership of working interests in the Treasure Well No. 8 leasehold and did not pertain to any accounting for prior production or any bonus contracts.

(14) That in the condemnation action it was stipulated by these applicants that total production of Treasure Well No. 8, up to the time the government took possession of the well, and all the moneys received from said production, was handled by Treasure Company.

Rep. Tr., Page No. 1235—2454 H. W. Civil.

Hence Scoville, who never received any of the production moneys, is not chargeable to applicants by intervention.

Dated: August 11, 1952.

/s/ LELAND J. ALLEN,

Attorney for Plaintiffs Walter B. Scoville and Adamant Company. [203]

[Endorsed]: Filed Aug. 11, 1952.

[Title of District Court and Cause.]

MEMORANDUM AND ORDER

Hall, D. J.

The proposed complaint in intervention is cast in one count only but, according to the prayer and the briefs in support of the motion to file the proposed complaint in intervention, it depends upon actually two causes of action; the first, to join with the plaintiffs in the instant case for an accounting against the original defendants on certain oil royalties; and the second for an accounting and judgment against the plaintiff Scoville arising in connection with a so-called "two for one" agreement.

As to the accounting against defendants de Bretteville and Treasure Company; it appears from the proposed complaint in intervention that the applicants Bullen and Hayward have a participating royalty interest [205] in the well from which the money now on deposit in court was derived after condemnation by the government. That is the same type of interest for which the plaintiff Scoville seeks an accounting from the defendants de Bretteville and Treasure Company. That interest appears to have derived from Scoville. It is clear, therefore, that the applicants Bullen and Hayward have an interest in the accounting which Scoville seeks from the defendants de Bretteville and Treasure Company, that there are common questions of law and fact, and are therefore entitled to intervene.

As to the "two for one" agreement. Recitation of

the long and tedious history of this litigation is unnecessary here. The defendants de Bretteville and Treasure Company are not objecting to the intervention. It is only the original plaintiff, Scoville, who, in addition to many other points, urges that the statute of limitations now prevents the applicants Bullen and Hayward from joining in any suit. I think the statute of limitations does not prevent the intervention.

Rose vs. Conlin, 52 Cal. App. 225, is authority for the proposition that the cause of action in that case arose when there was a res to which the remedy sought could be applied; and also as authority for the proposition that the claimant in that case could have intervened in the suit which resulted in a money judgment constituting the res. In that case a controversy arose concerning foreclosure of mortgages and a taking by the Southern Pacific Railroad which the court finally held was a condemnation and gave a money judgment. The holder of a deficiency on a mortgage foreclosure did not intervene in the litigation which resulted in the condemnation judgment, but chose rather to sue after the award for the condemnation was made. [206]

The court held that the statute did not begin to run until the award was made and the judgment for money, i.e., the res came into being.

Applying the doctrines of that case to the instant one it appears that the "two for one" agreement called for the payment of money out of production of an oil well. But before the oil well could produce sufficient money to satisfy the agreement the gov-

ernment condemned and took the property. On a jury trial an award was made for the taking, which included the value of future production; and Scoville's interest in future production was not determined until the time that judgment became final. The judgment may well have been in the condemnation suit that the future production of the well had no value. The statute began to run, not from the date that the government took the property in 1942, but rather began to run at the time the awards were made final, which was not until the mandate from the Circuit Court in July 1952. It was not until the mandate came down that Scoville's interest in the award was fixed as the sum of $30,672. That money is on deposit in this court. Under the opinion of the Circuit Court this money cannot be distributed until the within accounting action is determined. It follows that the statute of limitation has not run and that the proposed complaint in intervention is timely.

While the Circuit Court affirmed the holding of the trial court that "the enforcement of the so-called "two for one" agreement between the Bullens and the Haywards and Walter B. Scoville is a personal matter and is not a matter for settlement in the within case", it is to be noted that that holding was confined to the "within case," viz.: the condemnation case. I do not regard such a holding as [207] precluding the Bullens and the Haywards from intervening in this case which is certainly an entirely different case than the condemnation case.

Whether a lien exists in favor of those holding

the "two for one" agreement or not, and whether such a "two for one" agreement is or is not a royalty interest or an interest in land, the fact nevertheless remains that the award in favor of Scoville included the value of future production and now stands as money on deposit in court in place and stead of the original oil well or Scoville's interest in it, and under the doctrine of Rose vs. Conlin, supra, did not actually come into being as a res until July 1952, as above indicated. Clearly, therefore, the applicants will or might be adversely affected by the distribution to Scoville of his share of the money on deposit in court.

I have examined the other objections raised by Scoville and deem them to be without merit.

The applicants, Bullen and Hayward, are, therefore, entitled to file the Complaint in Intervention, as to the first cause of action as a matter of discretion, and as a matter of right under Rule 24(a)(3) as to the second cause of action.

It is ordered that the proposed complaint in intervention be filed on condition that the plaintiff redraft the same and separately state his causes of action.

Los Angeles, California, Oct. 30, 1952. [208]

[Endorsed]: Filed Oct. 30, 1952.

In the District Court of the United States, Southern District of California, Central Division

No. 1761-P.H.-Civil

WALTER SCOVILLE, et al., Plaintiffs,

vs.

G. DE BRETTEVILLE, et al., Defendants.

HERSCHEL BULLEN and MARY H. BULLEN, his wife, J. C. HAYWARD and MARIAN S. HAYWARD, his wife,

Plaintiffs in Intervention,

vs.

TREASURE COMPANY, a corporation, WALTER SCOVILLE, and THE ADAMANT COMPANY, a corporation,

Defendants in Intervention.

COMPLAINT IN INTERVENTION

Come now the plaintiffs in intervention and, by leave of Court, file this, their complaint in intervention. For a cause of action against the defendant Treasure Company, being their first cause of action, the plaintiffs in intervention allege: [209]

I.

That on or about the 27th day of September, 1938, plaintiffs in intervention Herschel Bullen and J. C. Hayward entered into a certain contract in writing whereby plaintiffs in intervention agreed to and did advance the sum of $5,000.00 to or for the benefit of defendant Treasure Company and defendants in intervention Walter B. Scoville and

The Adamant Company, for the purpose of completing and bringing into production a certain oil well situated on certain leasehold premises known as the Fletcher Lease, being Lots 9, 10 and 11 in Block 33 of Tract 9809, as per map recorded in Book 145, pages 91 et seq. of Maps, in the records of the County of Los Angeles, State of California.

II.

That said defendant in intervention Walter B. Scoville, and said two corporations, to wit, Treasure Company and The Adamant Company, were jointly interested in the drilling of said well, known as Treasure Well No. 8.

III.

That under the terms of said contract it was agreed that the plaintiffs in intervention should receive the following:

(1) A participating royalty interest in said well amounting to 2 per cent in the aggregate, which royalty was to be assigned to the plaintiffs in intervention by Walter B. Scoville out of certain royalty interests theretofore acquired by him from defendant Treasure Company.

(2) The sum of $10,000.00, to be paid to the plaintiffs in intervention out of the first 15 per cent of gross production from said well.

IV.

That the contract above mentioned is set forth in a letter from plaintiff in intervention Herschel Bullen to George Halverson, an attorney for de-

fendant in intervention Walter B. Scoville, dated [210] September 27, 1938, the terms of which were agreed to in writing by the defendants in intervention Walter B. Scoville and The Adamant Company. A true copy of said contract is annexed hereto marked Exhibit A, and by this reference incorporated herein.

V.

That pursuant to said contract, and at the time of the execution thereof, plaintiffs in intervention delivered to George Halverson the two cashier's checks described therein, each in the sum of $2,500.00, and in a total aggregate amount of $5,000.00.

VI.

That thereafter the defendant in intervention Walter B. Scoville applied to the Commissioner of Corporations for permission to transfer in escrow the two 1 per cent participating royalty interests provided by said contract to be assigned to the plaintiffs in intervention; that said application was executed by the defendant in intervention Walter B. Scoville, and joined in and consented to in writing by the defendant Treasure Company and the defendant in intervention The Adamant Company; and that a true copy of said application to the Commissioner of Corporations is annexed hereto marked Exhibit B, and by this reference incorporated herein.

VII.

That thereafter the Commissioner of Corporations issued his order consenting to the transfer in

escrow of said royalty interests, as requested in the aforesaid application, Exhibit B hereof; that thereafter, and on or about the 9th day of November, 1938, said George Halverson delivered said cashier's checks to G. de Bretteville, president of defendant Treasure Company; and that the proceeds of said checks, to wit, the sum of $5,000.00, were used in placing on production said oil and gas well, being Treasure Well No. 8.

VIII.

That on or about the same date, to wit, the 9th day of [211] November, 1938, the defendant in intervention Walter B. Scoville executed and delivered assignments whereby he assigned to the plaintiffs in intervention Herschel Bullen and Mary H. Bullen, as joint tenants, a 1 per cent participating royalty in said well, and in the leases comprising the drill site therefor, and to the plaintiffs in intervention J. C. Hayward and Marian S. Hayward, as joint tenants, a 1 per cent participating royalty in said well, and in the leases comprising the drill site therefor; that the written assignments representing said royalty interests were delivered to and are held in escrow by the Commissioner of Corporations of the State of California; that under the terms of said assignments plaintiffs in intervention became and ever since have been entitled to an aggregate of 2 per cent of the proceeds of the sale of all oil, gas and other hydrocarbon substances produced from said Treasure Well No. 8, after deducting the necessary and reasonable costs of the operation of said well.

IX.

Plaintiffs in intervention are informed and believe that thereafter, and during the month of December, 1938, said well was placed on production, the money of these plaintiffs in intervention being used for that purpose, as aforesaid, and that said well was thereafter operated by the defendant Treasure Company, from time to time until on or about the 28th day of September, 1942, when the premises upon which it is located were condemned by the United States in that certain action pending in this Court, entitled United States vs. Certain Parcels of Land, No. 2454-B-Civil.

X.

Plaintiffs in intervention are informed and believe that during the period of its operation by defendant Treasure Company, said well produced large amounts of oil and gas, the exact amounts thereof and the times when produced being unknown to plaintiffs in intervention but being well known to said defendant; and that after [212] the payment of all expenses properly chargeable to plaintiffs in intervention there was a net profit to which the plaintiffs in intervention, as holders of said 2 per cent participating royalty interests, were entitled.

XI.

That no payments were ever made to the plaintiffs in intervention, as distributions of net profits upon the 2 per cent participating royalty interests held by the plaintiffs in intervention as aforesaid,

and that plaintiffs in intervention are entitled to an accounting from said defendant Treasure Company, and to a judgment requiring said defendant to pay to the plaintiffs in intervention their share of the net profits from the operation of said well, in accordance with the terms of the participating royalty assignments held by the plaintiffs in intervention.

For a second cause of action against the defendant Treasure Company, plaintiffs in intervention allege:

I.

Plaintiffs in intervention here repeat paragraphs I, II, III, IV, V, VI, VII, VIII and IX of their first cause of action, and incorporate the same herein by reference, as if the same had been specifically alleged in this second cause of action.

II.

That on the 11th day of July, 1949, in the condemnation proceedings in this Court hereinabove referred to, being United States vs. Certain Parcels of Land, No. 2454-B-Civil, a judgment was entered which, among other things, established a value of $194,500.00 for the working interest in said Treasure Well No. 8, said sum representing the value of future production owned by the lessee and its assignees, and provided for the payment of said sum by the United States of America as just compensation for the taking of said property. [213]

III.

That thereafter, as a result of further proceedings held in said condemnation case, the Court entered judgment distributing said award of $194,500.00 as follows:

Reconstruction Finance Corporation	$97,767.00
Adamant Company	47,925.00
Walter B. Scoville	30,672.00
Harry Wynn	11,502.00
H. Bullen and Mary H. Bullen	1,917.00
J. C. Hayward and Marian S. Hayward	1,917.00

IV.

That the aforesaid distribution award of $97,767.00 to Reconstruction Finance Corporation was made to it as the successor in interest of the lessee, defendant Treasure Company, said defendant Treasure Company having assigned to Reconstruction Finance Corporation all of its right, title and interest in the award. That the judgment allocating said award of $194,500.00 as aforesaid was affirmed by the Circuit Court of Appeals, except that payment of the awards made to all parties, other than the award of $97,767.00 to Reconstruction Finance Corporation, was ordered to be withheld pending completion of this and other accounting suits. That the full amount of said award had theretofore been paid into the registry of this Court by United States of America, and that all of said money, with the exception of the award to Reconstruction Finance Corporation, is still held in the registry of

this Court, and that the portion thereof belonging to the parties to this action is subject to the disposition of the Court in this case.

V.

That plaintiffs in intervention are entitled to have distributed to them, as their share of said condemnation award, the sum of $3,834.00, of which one-half, or $1,917.00, is payable to Herschel Bullen and Mary H. Bullen, and the other one-half to J. C. [214] Hayward and Marian S. Hayward.

For a cause of action against the defendants in intervention Walter B. Scoville and the Adamant Company, and the defendant Treasure Company, being their third cause of action, plaintiffs in intervention allege:

I.

Plaintiffs in intervention here repeat paragraphs I, II, III, and IV of their first cause of action, and incorporate the same herein by reference, as if the same had been specifically alleged in this third cause of action.

II.

That the terms of said contract are likewise set forth in writing in an application to the Commissioner of Corporations wherein the defendant in intervention Walter B. Scoville applied for permission to transfer in escrow the two 1 per cent participating royalty interests hereinabove mentioned; that said application not only asked for permission to transfer said royalty interests in es-

crow, but also stated in paragraph II thereof that the funds advanced by the plaintiffs in intervention as aforesaid were to be repaid two for one out of production, i.e., that they were to receive the sum of $10,000.00 from production, if any, for the $5,000.00 invested; that said application was executed by the defendant in intervention Walter B. Scoville, and was joined in and consented to in writing by the defendant Treasure Company, and the defendant in intervention The Adamant Company.

III.

That thereafter, and on or about the 9th day of November, 1938, said George Halverson delivered said cashier's checks to G. de Bretteville, President of defendant Treasure Company, and that the proceeds of said checks, to wit, the sum of $5,000.00, were used in placing on production said oil and gas well, being [215] Treasure Well No. 8.

IV.

Plaintiffs in intervention here repeat paragraph IX of their first cause of action, and incorporate the same herein by reference as if the same had been specifically alleged at this point.

V.

Plaintiffs in intervention are informed and believe that during the period of its operation by defendant Treasure Company, said well produced large amounts of oil and gas, the exact amounts thereof and the times when produced being un-

known to plaintiffs in intervention, but well known to said defendant; that 15 per cent of the gross proceeds of sale thereof amounted to more than $10,000.00; that said sum should have been paid to plaintiffs in intervention by virtue of their contract with defendant in intervention Walter B. Scoville and others, Exhibits A and B hereof.

VI.

That no payments were ever made to the plaintiffs in intervention on account of the obligation to pay to them the sum of $10,000.00 out of 15 per cent of the gross production from said well, as set forth in the contract, Exhibit A hereof, and in paragraph II of the application, Exhibit B hereof.

VII.

Plaintiffs in intervention here repeat paragraphs II, III and IV of their second cause of action, and incorporate the same herein by reference as if the same had been specifically alleged at this point.

VIII.

Plaintiffs in intervention are informed and believe that defendants in intervention Walter B. Scoville and The Adamant Company are insolvent, and that unless specific enforcement of the so-called two for one agreement, as set forth in Exhibit A hereof, [216] is had against said defendants, or one of them, if only one is liable, by applying a part of his, its or their share of the award for the working interest in said oil well to the satisfaction of

the obligation under said contract, Exhibit A hereof, plaintiffs in intervention will be irrevocably injured; and that plaintiffs in intervention have no adequate remedy at law.

Wherefore, plaintiffs in intervention pray as follows:

(1) That they may be allowed to have the benefit of any accounting proceedings heretofore had in this action, and such further accounting as may be required. That they have judgment against the defendant Treasure Company for such sums as may be found to be due to them as a result of such accounting, from the net proceeds of the operation of said well, Treasure Well No. 8, by defendant Treasure Company prior to the condemnation thereof, together with interest on such sums from the respective due dates thereof.

(2) That the Court order that there be paid to them their share of the award hereinabove set forth made by the Court in said condemnation case, being the value of their two 1 per cent participating royalty interests, to wit, the sum of $1,917.00 to the plaintiffs in intervention Herschel Bullen and Mary H. Bullen, and the sum of $1,917.00 to the plaintiffs in intervention J. C. Hayward and Marian S. Hayward.

(3) That the plaintiffs in intervention have judgment against the defendant Treasure Company, and the defendants in intervention Walter B. Scoville and The Adamant Company, for the sum of $10,000.00, being the principal sum due upon the

said two for one agreement, together with interest upon the sums which should have been paid on account thereof out of 15 per cent of gross production from the respective dates when such payments should have been made, and that such judgment be specifically enforced against and satisfied [217] out of the share of the aforesaid award belonging to defendants in intervention Walter B. Scoville and The Adamant Company, now held in the registry of this Court as hereinabove set out.

(4) For such other and further relief as the Court may deem just.

Dated: January 29, 1953.

WILLIAMSON, HOGE & CURRY,
/s/ By FULTON W. HOGE,
Attorneys for plaintiffs in intervention Herschel Bullen, Mary H. Bullen, J. C. Hayward and Marian S. Hayward. [218]

Duly Verified. [219]

EXHIBIT "A"

Mr. George Halverson, September 27, 1938
Financial Center Building,
Los Angeles, California.

Dear Mr. Halverson:

In the Treasure Company-Walter B. Scoville matter, we are enclosing herewith Mr. Scoville's application to the Commissioner of Corporations of the State of California for consent to transfer in escrow certain securities from applicant to certain other persons, among which are listed: Herschel

Bullen and Mary H. Bullen as Joint Tenants, and not as Tenants in Common, with full and absolute Title and Rights of Survivorship to the Survivor for One per cent, and, J. C. Hayward and Marian S. Hayward as Joint Tenants, and not as Tenants in Common, with full and absolute Title and Rights of Survivorship to the Survivor for One per cent, the said Herschel Bullen, Mary H. Bullen, J. C. Hayward and Marian S. Hayward have signed the certification on page 4 of the said application.

We are also enclosing herewith First Security Bank of Utah, N.A., Logan Branch's Cashier Check No. 34-9314 in favor of Herschel Bullen and by him endorsed to you, in the sum of $2,500.00, and First National Bank of Logan's Cashier Check No. 59770 in favor of J. C. Hayward and by him endorsed to you, in the sum of $2,500.00, total $5,000.00, which checks you are hereby authorized and instructed to deliver to the proper operating company, official or officials, for the uses and purposes in the above application therein mentioned, when the following has been complied with and agreed to between the parties hereto: [220]

First, when Walter B. Scoville and certain of his friends advance the necessary funds—these funds, $5,000.00, to be included in the said necessary funds to be repaid two for one out of production—to fully comply with paragraph II of page 2 of said application herewith enclosed, it being understood and agreed to that the said two for one out of production is to be repaid out of the first 15% of gross production from the said well.

Second, when the said application herewith enclosed is fully executed by Walter B. Scoville, joined in and consented to by Treasure Company and J. Orville Seeple as Agent of Walter B. Scoville and The Adamant Company, and consented to by the Commissioner of Corporations of the State of California, and the said securities are transferred in escrow in favor of the undersigned, provided that consent by Treasure Company is hereby waived in the event you are unable to get it, and if in your judgment the well can be pushed to completion under present arrangements.

Third, in the event the well is a failure or is abandoned by the said Walter B. Scoville, et al., it is understood and agreed that the said Walter B. Scoville will give the undersigned comparable interests in Section 22, Township 19 North, Range 104 West, in Baxter Basin, Wyoming, properties owned and held by himself or The Adamant Company, the said funds to be repaid two for one from first returns from royalties or production, the said Walter B. Scoville or Adamant Company to give us a contract accordingly.

Fourth, we understand that we are not going into a partnership and do not want to, and want it further understood that the funds hereby advanced are to cover any and all liability on our part and that we are not to be held personally responsible for any debts or claims of any kind whatsoever, either existing or contracted in the future, without our consent.

If you will draw the necessary assignments and

contracts covering the above and render us bill for this service, we shall be [221] pleased to remit.

Yours very truly,

/s/ Herschel Bullen

HB:HB—Encl.

We agree to the foregoing.

The Adamant Company,
By Helen Scoville, Secretary
Walter B. Scoville
The Walter B. Scoville Company,
By Walter B. Scoville. [222]

EXHIBIT "B"

Before the Department of Investment, Division of Corporations of the State of California, No. 63754 LA

In the Matter of the Application of Treasure Company for a permit authorizing it to sell and issue its securities.

APPLICATION FOR CONSENT

To the Commissioner of Corporations of the State of California:

Walter B. Scoville, the applicant herein, hereby requests the issuance of an order by the Commissioner of Corporations consenting to the transfer in escrow of certain securities from applicant to the persons hereinafter mentioned, and in support of such application represents:

I.

That on April 20, 1938, the Commissioner of Corporations issued to Treasure Company a permit authorizing the sale and issuance of certain securities. Issuance Clause 2 of said permit authorizing the issuance to this applicant of 19 one per cent participating royalty interests in the premises described in the leases filed with the application as Exhibits "A" and "B" and covering approximately one (1) acre of land. Paragraph 6 of said permit authorizing the issuance to this applicant of 18 1/6 one per cent royalty interests in the premises covered by the leases filed with the application as Exhibits "C" and "D" and covering approximately fifteen (15) acres of land. That on said 20th day of April, 1938, an order was issued designating the Commissioner of Corporations as escrow holder under said permit. That pursuant to the provisions of said permit the royalty interests hereinabove referred to have [223] been duly issued to this applicant and deposited in escrow with the Commissioner of Corporations.

II.

The well described in the application of Treasure Company for a permit has been drilled to the depth of 6510 feet and is now ready for completion. In the opinion of all interested parties the cores and technical tests fully justify the completion and testing of this well. Applicant, Walter B. Scoville, desires to assist in competing said well and certain of his friends and business associates are willing

to advance the necessary funds, to be repaid two for one out of production. As an additional consideration or bonus for such advances, applicant desires to assign and transfer within escrow participating royalties in all of said leases to the following persons and in the following amounts:

Herschel Bullen and Mary H. Bullen as Joint Tenants, and not as Tenants in Common, with full and absolute Title and Rights of Survivorship to the Survivor—Percentage, One.

J. C. Hayward and Marian S. Hayward as Joint Tenants, and not as Tenants in Common, with full and absolute Title and Rights of Survivorship to the Survivor—Percentage, One.

III.

Applicant represents that all of said persons have known him for a number of years; that they are familiar with the condition of said well and with the plan of operation generally. He further represents that no public solicitation whatsoever has been made and that he has discussed the matter only with friends of long standing and with former business associates.

Wherefore, applicant, Walter B. Scoville, requests the issuance of an order consenting to the transfer in escrow of certain [224] participating royalty interests from him to the persons and in the amounts specified hereinabove, subject to the same terms and conditions as the royalty interests now in escrow in his name.

Walter B. Scoville, Applicant

State of Utah,
County of Cache—ss.

Walter B. Scoville, being by me first duly sworn, deposes and says: that he is the applicant in the foregoing Application; that he has read said Application and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon his information or belief, and as to those matters that he believes it to be true.

Walter B. Scoville

Subscribed and sworn to before me this 30 day of September, 1938.

Alta B. Clark,
Notary Public in and for the County of Cache, State of Utah. Residing at Logan, Utah.

Treasure Company, the issuer of the securities involved in the foregoing Application, does hereby join in and consent to said Application.

Treasure Company,
[Seal] By I. Cowan, Secy. [225]

J. Orville Seeple, as agent of Walter B. Scoville and The Adamant Company, does hereby join in and consent to the foregoing Application and the transfer therein referred to.

The Adamant Company,
By Helen Scoville, Secretary
J. Orville Seeple

The undersigned individuals, named in the foregoing Application as prospective transferees of the participating royalty interests therein described, do hereby certify that they have individually known Walter B. Scoville for a long period of time; that they are familiar with the condition of and facts relating to the above mentioned well; that they are familiar with the general plan of operation and that they desire to have transferred to them within escrow participating royalty interests in the amounts set opposite their names hereinabove.

Herschel Bullen,
Mary H. Bullen
J. C. Hayward,
Marian S. Hayward [226]

Affidavit of Service by Mail attached. [227]

[Endorsed]: Filed Jan. 29, 1953.

[Title of District Court and Cause.]

ANSWER OF DEFENDANTS IN INTERVENTION

Come now the defendants in intervention, the Adamant Company, a corporation, and Walter B. Scoville, and answer the complaint in intervention, as follows:

First Defense

The complaint in intervention fails to state a claim against defendants in intervention upon which relief can be granted. [228]

Second Defense

I.

Deny that the plaintiffs in intervention by reason of any contract, or otherwise, advanced the sum of $5,000.00, or any other sum of money, for the benefit of Walter B. Scoville or the Adamant Company; but allege that any moneys advanced or paid by Herschel Bullen and J. C. Hayward to the Treasure Company was for the sole benefit of said plaintiffs in intervention and as an investment in an oil venture.

II.

Admit that Walter B. Scoville and the Adamant Company were interested in the drilling of Treasure Well No. 8.

III.

Deny that the terms of said alleged contract, marked Exhibit A, required the Adamant Company or Walter B. Scoville to issue any participating royalty interest to Herschel Bullen or J. C. Hayward or to pay the sum of $10,000.00, or any sum whatsoever, to the plaintiffs in intervention out of the first fifteen per cent of gross production from said well, or out of any production from said well.

Allege that said purported contract, plaintiffs in intervention Exhibit A, constituted a letter addressed to their attorney Mr. George Halverson, directing and authorizing said George Halverson to draw the necessary assignments and contracts covering the above matters and to render a bill for his services in that connection, and that said plaintiffs in intervention would remit for his services.

And allege further that, as set forth on page 3 of Exhibit A, the words "we agree to the foregoing" was a statement that said George Halverson should prepare all necessay assignments and contracts covering the rights of the plaintiffs in intervention; and that said statement did in no manner bind the Adamant Company or Walter B. Scoville to pay any funds out of production or to do [229] anything whatsoever under said contract except to agree that said George Halverson should draw the necessary assignments and contracts to cover the rights of Messrs. Bullen and Hayward.

Allege further that Walter B. Scoville transferred to Messrs. Bullen and Hayward and their respective wives a one per cent participating royalty interest each, which constituted, so far as Adamant Company and Walter B. Scoville are concerned, a full satisfaction of the investment of $5,000.00.

And allege further that Adamant Company and Walter B. Scoville never operated said Treasure Well No. 8, never received any moneys from the production of said Treasure Well No. 8, but that said well was operated entirely by Treasure Company and one G. de Bretteville from the time it was placed on production and down to the present day. And that said Treasure Company and G. de Bretteville sold and received payment for all the production from said well.

IV.

Deny that said Exhibit A to the complaint in intervention constitutes a contract between the plaintiffs in intervention and the defendants in in-

tervention, Walter B. Scoville and the Adamant Company or either of them.

V.

Allege that defendants in intervention are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph V of the first cause of action, and deny each and every allegation contained therein.

VI.

Admit that Walter B. Scoville applied to the Commissioner of Corporations as set forth in Exhibit B to the complaint in intervention; but deny that Exhibit A constituted a contract.

VII.

Admit that the Commissioner of Corporations issued his [230] order consenting to the transfer in escrow of said royalty interest.

Allege that they are without knowledge or information sufficient to form a belief as to the truth of the further allegations contained in paragraph VII of the first cause of action.

And deny that the said George Halverson delivered any cashier's checks to G. de Bretteville or that proceeds of said checks were used in placing on production said Treasure Well No. 8.

VIII.

Admit paragraph VIII of the first cause of action of the complaint in intervention.

IX.

Admit that Treasure Well No. 8 was placed on production in December, 1938 and that said well was thereafter operated by the defendant Treasure Company until September 28, 1942, at which latter date the premises were condemned by the United States Government in behalf of the Reconstruction Finance Corporations.

X.

Admit paragraph X of said first cause of action of said complaint.

XI.

Allege that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph XI of the first cause of action, and these defendants in intervention deny that no payments were ever made to the plaintiffs in intervention as distribution of said profits upon the two per cent participating royalty interest; and allege, upon information and belief, that the plaintiffs received the sum of $3,500.00 for their two per cent participating royalty interest.

Third Defense

These defendants in intervention admit, deny, and allege as follows: [231]

I.

Admit that the defendants in intervention, together with one Joe Seeple and Harry Wynn, and no other parties, obtained a jury verdict establishing a value of $194,500.00 for the working interests of eighty and six-tenths per cent in said Treasure

Well No. 8, and that said sum represented the value of future production owned by the said working interests, and that said verdict, entered July 11, 1949, provided for the payment of said sum by the United States of America as just compensation for the taking of said property.

II.

Admit paragraph III of said second cause of action.

III.

Admit paragraph IV of said second cause of action, except that these defendants in intervention deny that any portion of the moneys held by the registry of the Court is subject to the disposition of the Court in this case.

IV.

Admit paragraph V of said second cause of action in the complaint of intervention.

Fourth Defense

I.

In answer to the third cause of action in the complaint of intervention, these defendants in intervention re-allege paragraphs answering paragraphs I, II, III and IV of the first cause of action and incorporate the same herein by reference as if the same had been specifically alleged in this fourth defense.

II.

Deny paragraph II of said third cause of action, and allege that there is no contract binding upon these defendants in [232] intervention.

Admit that Exhibit B is a correct copy of the application filed with the Commissioner of Corporations.

III.

For lack of information and belief, these defendants in intervention deny that on the 9th day of November, 1938, or at any other time, Mr. George Halverson delivered any cashier's checks to G. de Bretteville, president of defendant Treasure Company, and deny that the proceeds of said checks, in the sum of $5,000.00 or any other sum, were used in placing on production said Treasure Well No. 8.

IV.

The defendants in intervention re-allege paragraph IX of their second defense in answer to paragraph IX of the first cause of action.

V.

Defendants in intervention are informed, and believe and upon such information and belief allege, that Treasure Company and G. de Bretteville produced from Treasure Well No. 8 oil and gas for which they received the approximate sum of $205,-411.69; and deny that any portion of said sum was payable to plaintiffs in intervention by virtue of any contract with the defendants in intervention or either of them.

VI.

Defendants in intervention re-allege paragraph XI of their second defense and incorporate same in

answer to paragraph VI of the third cause of action of the complaint herein.

VII.

Deny that the defendants in intervention are insolvent and allege that there is no Two-for-one agreement between the plaintiffs in intervention and the defendants in intervention, and hence that plaintiffs in intervention have no cause of action [233] against these defendants in intervention or either of them.

Fifth Defense

The right of action set forth in the complaint did not accrue within six years prior to the filing of the complaint in intervention.

Sixth Defense

The defendants in intervention allege that any cause of action which plaintiffs in intervention may have upon their alleged contract, marked Exhibit A and attached to their complaint, is barred by reason of the Statute of Limitations of the State of California, being Section 337 of the Code of Civil Procedure of said State, and hence the complaint in intervention is without merit.

Wherefore, defendants in intervention pray that plaintiffs in intervention take nothing by reason of their complaint herein, and that defendants in intervention have judgment for their costs and disbursements herein expended and for such other and

further relief as to the Court may seem just and proper.

Dated: February 4, 1953.

/s/ LELAND J. ALLEN,
Attorneys for Defendants in Intervention, The Adamant Company and Walter B. Scoville

Duly Verified. [235]

Affidavit of Service by Mail attached. [236]

[Endorsed]: Filed February 10, 1953.

[Title of District Court and Cause.]

DECISION

The above entitled cause heretofore tried and submitted is hereby decided as follows:

1. Upon their complaint plaintiffs, Walter Scoville and The Adamant Company, are entitled to recover from the defendants, G. de Bretteville and Treasure Company, the sum of $13,000.00, admittedly advanced by Scoville. On the accounting asked by the plaintiffs in the complaint the court finds that, an accounting having been ordered and made, the defendants have accounted for all monies received by them and that no funds in which the plaintiffs or any of the other parties to the action have any interest are now in the possession of the defendants or either of them.

2. Plaintiffs in intervention, Herschel Bullen and Mary H. Bullen, and J. C. Hayward and Marian

S. Hayward, or any of them are not entitled to recover from the defendants [242] in intervention, Treasure Company, Walter Scoville and The Adamant Company, or any of them the sum of $10,000.00 or any part thereof by reason of the so-called "two-for-one agreement" dated September 27, 1938, and that said agreement is barred as to all the plaintiffs in intervention by the provisions of Section 337 of the California Code of Civil Procedure.

Each side shall pay their own costs. Formal findings and judgment to be prepared by Messrs. Nicholas and Mack, counsel for the defendants, under Local Rule 7.

Comment

As a guide to counsel in preparing findings the Court will state in what follows its conclusions upon the main issues involved. It should be stated at the beginning that, leaving aside any question of the applicability of the doctrine of the law of the case, I am satisfied that United States vs. Adamant Co., 1952, 9 Cir., 197 F.2d 1, clearly states the law upon the questions there discussed, and that the adjudication of the matters therein contained, such as the nature of the "two-for-one agreement," the apportionment of the award and the like, is correct. More, the briefs of counsel challenging, in an indirect manner, the conclusion that the "two-for-one agreement" did not assign an interest in the production of the well, but was merely a personal obligation, has not been shaken.

That conclusion was stated briefly in the opinion in this manner:

"We dispose of the claim arising from the 'Two-to-One Agreement' by stating that the trial court was correct in holding it to be a personal undertaking on the part of Scoville which gave the Bullens and Haywards no interest [243] in the well or production from it." (p. 8)

This determination is sustained by the rulings of the State Courts of California which are set forth in United States vs. Adamant, supra, pp. 5-6, 8-13, which further study has confirmed.

So I find, after a full study of the record and briefs, that the plaintiffs in intervention had only a personal claim against Scoville for double the amount of the $5,000.00, and that the agreement to pay that amount was merely an agreement to pay when the returns from the first 15% of production came in. It was not a charge upon the production of the well or an assignment or hypothecation of such percentage. This conclusion is re-enforced by the contemporaneous letter written by Dr. Hayward, August 22, 1939, indicating the intention to consider the money advanced as a personal obligation of Scoville. And even the letter from the attorney Charles Franklin Johnson, dated September 26, 1938, speaks of it as a "contingency," to avoid usury. In Bullen's letter to their attorney, Halverson, dated September 27, 1938, which is the basis of the claim, any personal liability which might go with ownership of production is rejected. The obligation being personal in nature and the letter being dated September 27, 1938, the action on it was barred when the Complaint in intervention was filed

on January 30, 1953, if we apply to it the maximum limitation applicable,—four years. (California Code of Civil Procedure, Sec. 337.) Much is made of the fact that Judge Peirson Hall, when granting leave to intervene, expressed the view that the action was not barred by the statute of limitation because the statute did not begin to run until the fund out of which the money was to be repaid came into being. This conclusion was based upon the allegations of the tendered complaint in intervention that the agreement was a conveyance [244] of an interest in the production of oil.

The rules relating to intervention (Federal Rules of Civil Procedure, Rule 24 are construed liberally. Judge Hall's Order dated October 30, 1952, is not a final determination either as to the nature of the agreement or as to the application of the statute of limitations. The views expressed related to the sufficiency of the allegations of the tendered complaint in intervention. Judge Hall did not intend to bind the trier of fact, whether himself or anyone else, to a final determination of the questions raised by answer to the complaint which could not be made until the case was tried on the merits. Before deciding this matter the writer consulted Judge Hall, who agrees with this interpretation of his Order.

The final determination announced that the undertakings towards the Bullens and Haywards by Scoville and the Adamant Company were personal obligations which are barred by the statute, is, of course, mine. In conjunction with this matter, I am of the view that, while the plaintiffs are entitled

to the repayment of the sum of $13,000.00 advanced by Scoville (payment of which is admitted in the record and is reflected in the audit), the "two-for-one agreement," which was an inducement for outsiders to join the venture did not apply to Scoville and Adamant. I realize that in certain oil ventures the risk may be so great that persons advancing money for the completion of a well might make an onerous contract which transferred to them interests in the production and also repaid them the money manifold. However, in order to find such contract in favor of persons in the original venture and connected with its management there should be before the court clear and convincing proof from independent sources. This is lacking here.

By the same token, the failure of Scoville [245] and Adamant to pay their prorata share of the cost of production does not call for a forfeiture of their interests in the venture. The Judgment in the Superior Court—which has been referred to as the "Vickers Judgment,"—is dated November 27, 1940, and made the following adjudication:

"That the contract dated April 5, 1938, a copy of which is attached to defendant's answer, and the addendum thereto, a copy of which is set forth in plaintiffs' complaint, were terminated as of January 31, 1939, save and except that the plaintiffs, The Adamant Company and Walter B. Scoville, and their assigns, are entitled to retain their respective interests in said lease hereinbefore described upon which said well 'Treasure No. 8' is drilled, to wit, twenty-five per cent (25%) therein to The Adamant

Company, a corporation, and nineteen per cent (19%) therein to Walter B. Scoville, both of which interests are subject to any Assignment made and subject to their pro rata share of the completion, operation and maintenance costs and charges of said well."

It is not disputed that the monies were to be reimbursable advances for operating costs. Ultimately, the operating company paid them out of the income from production. An abandonment of a joint venture agreement may be inferred from the acts of parties and their failure to perform their obligations. The leading California case on the subject was one which I tried on the Superior Court, Middleton vs. Newport, 1936, 6 C(2) 57, 62, and which has been followed consistently: See, Fooshee vs. Sunshine, 1950, 96 C.A.(2) 336, [246] 343; Richards vs. Plumbe, 1953, 116 C.A.(2) 132, 138; Aaron vs. Puccinelli, 1953, 121 C.A.(2) 675, 678-679.

The "Vickers Judgment" confirmed the rights of Scoville and Adamant to certain percentages in the lease. We cannot consider the conditions attached, the advance of operating expenses,—which were at all times repayable,—a condition subsequent, the non-performance of which would warrant a forfeiture of a vested interest. Equity abhors forfeitures. And the parties themselves not having chosen to spell out the penalty for failure to advance monies for operation, the only consequence when the operation was successful is to surcharge the enterprise with the expenditures. This, of course, has actually been done. And we are not, in

the circumstance, bound to follow the cases relied on by the defendants and which consider the failure to perform certain obligations as ground for forfeiture. The conditions before us were not of that character. After all, the only detriment which California law attaches for failure to perform a contract to pay money is payment of interest. (California Civil Code, Sec. 3302)

So I conclude that both under the doctrine of res judicata and on the facts in the case, the interests of Scoville and Adamant in the venture are as stated in the "Vickers Judgment" and as recognized by Judge Westover in the condemnation case.

As to the accounting, I accept and agree with the views expressed by Judge Hall who ordered it, as to the matters brought before him. As to the additional items left open, relating to certain allowances, as to which evidence was presented from the record in the prior case, I am of the view that they were proper charges. In sum, I conclude that the accounting does not show any improper charges or withholding [247] or misapplication of funds. It follows that, in all respects, the defendants have fully accounted to the owner of participating interests for the monies received and expended during the operation and up to and including the acquisition of the property by the Government through condemnation proceedings and since. And I so find.

In view of the fact that the Court of Appeals in remanding the condemnation case, stated that the apportioned amounts of the award might be depleted by the findings in this case, it is evident from

the conclusion reached, and I so find, that the amounts to be received by the litigants now before the court from the award in the condemnation proceeding are those set forth in the Judgment of Judge Westover dated October 23, 1950, apportioning the funds, and affirmed by the Court of Appeals. The proper amounts to be received without any deductions are:

Adamant Company: 25% or $47,925.00.
Walter B. Scoville: 16% or $30,672.00.
H. Bullen and Mary H. Bullen: 1% or $1,917.00.
J. C. Hayward and Mary S. Hayward: 1% or $1,917.00.

The Judgment for $13,000.00 in favor of Scoville and Adamant is, of course, a personal judgment against de Bretteville and Treasure Company. This matter is adverted to so that proper findings may be prepared as to this matter so as to avoid further controversy on the subject when application is made in the condemnation suit before Judge Westover for the distribution of funds in accordance with the mandate of the Court of Appeals.

Dated this 11th day of April, 1955.

/s/ LEON R. YANKWICH,
Chief U.S. District Judge [248]

Appearances: For the Plaintiffs: Leland J. Allen, Esquire, Los Angeles, California. For the Plaintiffs in Intervention: Hoge & Perry, By: Fulton W. Hoge, Esquire, Los Angeles, California. For the

Defendants: John H. Rice, Esquire, and Max G. Kolliner, Esquire, Los Angeles, California. [249]

[Endorsed]: Filed April 11, 1955.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled case came on regularly for trial before the Court without a jury, plaintiffs Walter B. Scoville and The Adamant Company appearing by their attorney, Leland J. Allen; plaintiffs-in-intervention Herschel Bullen, Mary E. Bullen, J. C. Hayward and Marian *B.* Hayward, appearing by their attorneys Hoge and Perry and Fulton W. Hoge; and defendants G. de Bretteville and Treasure Company appearing by their attorneys, Nicholas & Mack and John H. Rice and Max G. Kolliner; and evidence, both oral and documentary, having been introduced by and on behalf of all parties appearing and briefs having been filed by all parties appearing and the case having been submitted, the Court now makes its Findings of Fact and Conclusions of Law as follows: [250]

Findings of Fact

I.

Plaintiff Walter B. Scoville is a citizen and resident of the State of Utah and Plaintiff The Adamant Company is a corporation organized and exist-

ing under the laws of the State of Utah. Defendant G. de Bretteville is a citizen and resident of the State of California and defendant Treasure Company is a corporation organized and existing under the laws of the State of California. The amount in controversy, exclusive of interest and costs, exceeds the sum of Three Thousand and no/100 Dollars ($3,000.00).

II.

With reference to the controverted allegations in Paragraph III and in Paragraphs V to XII, inclusive, in the First Cause of Action of plaintiffs' complaint which raise sundry issues as to defendant Treasure Company's accountability to plaintiffs for moneys received in the operation of Treasure Well No. 8, the report of the Special Master appointed by this Court before whom a formal accounting was conducted, is adopted by this Court insofar as said report shows that there were no improper charges or withdrawals or misapplication of funds by defendant Treasure Company or by defendant G. de Bretteville during the period covered by said accounting. As to certain items expressly left open by the Special Master in his report relating to certain allowances as to which evidence was presented during the trial of this case, all charges shown in defendant Treasure Company's said accounting are in accordance with good accounting practice and are proper charges.

III.

The judgment filed in the Superior Court of the State of California, in and for the County of Los

Angeles, on November 27, 1940, in Case No. 441,484 (hereinafter called the "Vickers Judgment"), includes the following adjudication in Paragraph III:

"That the contract dated April 5, 1938, a copy of which is attached to defendant's answer, and the addendum thereto, a copy of which is set forth in plaintiffs' complaint, were terminated as of January 31, 1939, save and except that the plaintiffs, The Adamant Company and Walter B. Scoville, and their assigns, are entitled to retain their respective interests in said lease hereinbefore described upon which said well 'Treasure No. 8' is drilled, to wit, twenty-five per cent (25%) therein to The Adamant Company, a corporation, and nineteen per cent (19%) therein to Walter B. Scoville, both of which interests are subject to any Assignments made and subject to their pro rata share of the completion, operating and maintenance costs and charges of said well."

IV.

Plaintiff Walter B. Scoville did advance the sum of $13,000 to defendant Treasure Company for the completion of Treasure Well No. 8, and said Walter B. Scoville has received back no part of said funds so advanced. These funds were advanced prior to completion of said well on or about December 7, 1938.

V.

Neither defendant Treasure Company nor defendant G. de Bretteville offered any "2 for one agreement" to either plaintiff Walter B. Scoville or to plaintiff The Adamant Company on any funds ad-

vanced by plaintiffs, or either of them, for completion of Treasure Well No. 8.

VI.

Moneys advanced for operating costs of Treasure Well No. 8 were advanced on a reimbursable basis and such advances ultimately were paid by defendant Treasure Company out of proceeds from [252] the production of said well.

VII.

Defendant Treasure Company and plaintiff Walter B. Scoville and plaintiff The Adamant Company failed to provide by contract the penalty to be applied for failure to advance moneys for operation of Treasure Well No. 8 in accordance with contractual commitments.

VIII.

The amounts apportioned to plaintiffs Walter B. Scoville and The Adamant Company and to plaintiffs-in-intervention Herschel Bullen, Mary E. Bullen, J. C. Hayward and Marian *B.* Hayward, as set forth in the judgment entered by Judge Westover on October 23, 1950, in the Federal condemnation distribution trial designated No. 2454-HW Civil, are as follows:

The Adamant Company: 25% or $47,925.00.

Walter B. Scoville: 16% or $30,672.00.

Herschel Bullen and Mary E. Bullen: 1% or $1,917.00.

J. C. Hayward and Marian *B.* Hayward: 1% or $1,917.00.

There are no off-sets or charges to be made against the amounts so apportioned as a result of this lawsuit.

IX.

On or about the 27th day of September, 1938, plaintiffs-in-intervention Herschel Bullen and J. C. Hayward entered into a certain contract in writing with defendant-in-intervention Walter Scoville whereby said plaintiffs-in-intervention agreed to advance the sum of $5,000.00 for the purpose of completing and bringing into production said Treasure Well No. 8.

X.

Under the terms of said contract, dated September 27, 1938, it was agreed that plaintiffs-in-intervention should receive the following:

(1) The sum of $10,000.00, being the repayment, two for one, [253] on the terms and conditions stated in the contract, of the $5,000.00 to be advanced by the plaintiffs-in-intervention.

(2) A participating royalty interest in said well amounting to 2% in the aggregate, a 1% royalty to go to Herschel Bullen and Mary H. Bullen, and a 1% royalty to go to J. C. Hayward and Marian S. Hayward.

XI.

Said contract is set forth in a letter from plaintiff-in-intervention Herschel Bullen to George Halverson, dated September 27, 1938, the terms of which were agreed to in writing by defendant-in-

intervention Walter B. Scoville. Defendant Treasure Company was not a party to said agreement, and was not bound thereby. A true copy of said letter, and of the agreement endorsed thereon by defendants-in-intervention Walter B. Scoville and The Adamant Company, is attached to the complaint-in-intervention herein and marked Exhibit A, and a true copy of the application to the Commissioner of Corporations referred to in said letter and relating to the assignment of said participating royalty interests to plaintiffs-in-intervention, is attached to the complaint-in-intervention herein and marked Exhibit B.

XII.

Pursuant to said agreement plaintiffs-in-intervention advanced the sum of $5,000.00, and said money was used as part of the funds by which said oil well, Treasure Well No. 8, was placed on production, and plaintiffs-in-intervention have fully performed all terms of said agreement by them to be performed. No payments were ever made to plaintiffs-in-intervention on account of the obligation to pay to them the sum of $10,000.00, as set forth in said contract, Exhibit A of the complaint-in-intervention.

XIII.

It was the intention of the parties to said contract that payment of said sum should be made to the plaintiffs-in-intervention when and if said well was placed on production, and from time to [254] time thereafter, in an amount equal to 15% of the

gross production thereof, until the sum of $10,000.00 had been paid. It was the intention of the parties to said contract that the obligation to pay said sum of $10,000.00 should be a charge upon the production of the well, or upon any interest therein of the obligors Walter B. Scoville or The Adamant Company, but it was their intention that the obligation to pay said sum of $10,000.00 should be the personal obligation of said Walter B. Scoville only.

XIV.

The defendant Treasure Company has fully accounted to plaintiffs-in-intervention for their respective shares of the net production from said well.

XV.

Except as herein found, other allegations found in the answer or other pleadings are found not to be true.

Conclusions of Law

I.

This matter involves a controversy between citizens and residents of different states and, there being the requisite jurisdictional amount in controversy, this Court has jurisdiction of the cause by reason of diversity of citizenship.

II.

In all respects defendants G. de Bretteville and Treasure Company have fully accounted to plain-

tiffs Walter B. Scoville and The Adamant Company as owners of participating royalty interests in Treasure Well No. 8 for all moneys received and expended during the operation of said well both prior to and subsequent to the date when the Government of the United States seized the property upon which the said well is located in condemnation proceedings.

III.

The Vickers Judgment is res adjudicata on the issue of ownership by plaintiffs Walter B. Scoville and The Adamant Company of their respective participating royalty interests in the lease upon which Treasure Well No. 8 is located. [255]

IV.

The Vickers Judgment confirmed the right of plaintiff Walter B. Scoville to ownership of 19% participating royalty interest in the lease upon which Treasure Well No. 8 is located, which interest has been reduced to 16% by certain assignments made by said Scoville. The Vickers Judgment confirmed the right of plaintiff The Adamant Company to ownership of 25% participating royalty interest in said lease.

V.

Whatever rights plaintiff Walter B. Scoville and plaintiff The Adamant Company enjoyed under a certain contract with defendant Treasure Company dated April 5, 1938, were merged as a matter of law in the Vickers Judgment.

VI.

The failure of plaintiff Walter B. Scoville and of plaintiff The Adamant Company to pay their pro rata share of the costs of production of Treasure Well No. 8 does not call for a forfeiture of their interests in the venture. Nonperformance of the conditions set forth in Paragraph III of the Vickers Judgment does not warrant a forfeiture of vested interests.

VII.

The obligation of Walter B. Scoville as a party to said agreement of September 27, 1938, to pay to the plaintiffs-in-intervention the sum of $10,000.00, was a personal obligation of said Walter B. Scoville, and such obligation did not give to the plaintiffs-in-intervention, or to any of them, any interest in or charge upon the production of said well, or any interest therein of said defendants-in-intervention, whether by way of security for payment of said sum of $10,000.00 or otherwise, and that said obligation is barred by the statute of limitations of the State of California, specifically by the provisions of § 337 of the Code of Civil Procedure of said state. [256]

VIII.

Defendants Treasure Company and G. de Bretteville are indebted to plaintiffs Walter B. Scoville and The Adamant Company for the $13,000 advanced for completion of Treasure Well No. 8.

Let judgment be entered accordingly.

Dated this 24th day of May, 1955.

/s/ LEON R. YANKWICH,
United States District Judge [257]

[Endorsed]: Lodged May 16, 1955. Filed May 24, 1955.

In the United States District Court for the Southern District of California, Central Division

No. 1761-Y.—Civil

WALTER B. SCOVILLE and THE ADAMANT COMPANY, a corporation, Plaintiffs,

vs.

G. de BRETTEVILLE and TREASURE COMPANY, a corporation, Defendants.

JUDGMENT

The above-entitled action came on for trial before the Court without a jury, plaintiffs Walter B. Scoville and The Adamant Company appearing by their attorney Leland J. Allen, and plaintiffs-in-intervention Herschel Bullen, Mary H. Bullen, J. C. Hayward and Marian *B.* Hayward, appearing by their attorneys Hoge & Perry and Fulton W. Hoge, and defendants G. de Bretteville and Treasure Company appearing by their attorneys Nicholas & Mack and John H. Rice and Max G. Kolliner, and testimony having been offered and briefs filed by all parties and the Court, after due deliberation

having rendered its decision, and on the 24th day of May, 1955, made and filed its Findings of Fact, Conclusions of Law and Order for Judgment;

Now, Therefore, pursuant thereto, it is ordered and adjudged, as follows, to wit: [258]

I.

Plaintiffs, Walter B. Scoville and The Adamant Company, have judgment against defendants, G. de Bretteville and Treasure Company, in the sum of Thirteen Thousand and no/00 Dollars ($13,000.00), constituting reimbursement to plaintiffs for moneys advanced by them to defendants as part of the completion costs of Treasure Well No. 8.

II.

Neither plaintiffs-in-intervention, Herschel Bullen, Mary H. Bullen, J. C. Hayward and Marian S. Hayward, nor any of them, are entitled to recover anything from defendants-in-intervention G. de Bretteville, Treasure Company, Walter B. Scoville and The Adamant Company, or any of them.

III.

Defendants G. de Bretteville and Treasure Company have accounted for all moneys received by them in the operation of Treasure Well No. 8 and no funds derived from the operation of said well in which plaintiffs, or either of them, or plaintiffs-in-intervention, or either of them, have any interest are now in the possession of defendants, or either of them.

IV.

Plaintiffs, plaintiffs-in-intervention and defendants shall each pay their respective costs of suit.

Dated this 24th day of May, 1955.

/s/ LEON R. YANKWICH,
Judge of the U. S. District Court [259]

Affidavit of Service by Mail attached. [260]

[Endorsed]: Lodged May 16, 1955. Filed and Entered May 24, 1955.

[Title of District Court and Cause.]

NOTICE OF APPEAL OF PLAINTIFFS-IN-INTERVENTION

Notice Is Hereby Given that Herschel Bullen, Mary H. Bullen, J. C. Hayward and Marian S. Hayward, hereby appeal to the Court of Appeals for the Ninth Circuit from that certain [261] judgment entered in the above entitled action on May 24, 1955.

Dated: June 21, 1955.

HOGE & PERRY,
/s/ By FULTON W. HOGE,
Attorneys for Herschel Bullen, Mary H. Bullen, J. C. Hayward and Marian S. Hayward. [262]

[Endorsed]: Filed June 22, 1955.

[Title of District Court and Cause.]

ORDER EXTENDING TIME TO DESIGNATE RECORD AND DOCKET APPEAL

Good cause appearing therefor,

It Is Ordered that the time for the Plaintiffs in Intervention Hershel Bullen, Mary H. Bullen, J. C. Hayward and Marian S. Hayward, to designate and docket their record on appeal in the above entitled proceeding, under the Notice of Appeal filed by said Plaintiffs in Intervention on June 22, 1955, be [263] and the same is hereby extended to September 20, 1955.

Dated this 7th day of July, 1955.

/s/ LEON R. YANKWICH,
Chief Judge of the U. S. District Court [264]

[Endorsed]: Filed July 7, 1955.

[Title of District Court and Cause.]

DEFENDANTS NOTICE OF APPEAL

Notice Is Hereby Given that G. de Bretteville and Treasure Company, hereby appeal to the Court of Appeals for the Ninth Circuit from that certain judgment entered in the above-entitled action on May 24, 1955.

Dated: July 11, 1955.

NICHOLAS & MACK,
/s/ By JOHN H. RICE,
Attorneys for Defendants G. de Bretteville and Treasure Company. [265]

[Endorsed]: Filed July 12, 1955.

[Title of District Court and Cause.]

STATEMENT OF POINTS ON APPEAL BY THE APPELLANTS HERSCHEL BULLEN, MARY H. BULLEN, J. C. HAYWARD AND MARIAN S. HAYWARD PURSUANT TO RULE 75(d), FEDERAL RULES OF CIVIL PROCEDURE

Come now the appellants, Herschel Bullen, Mary H. Bullen, J. C. Hayward and Marian S. Hayward, and, pursuant to Rule 75(d), Federal Rules of Civil Procedure, state the following points upon which they will rely in the prosecution of the appeal here-

tofore taken by them in said cause from the Judgment entered by this [269] Court on May 24, 1955:

I.

The Court erred in its finding, as set forth in its Finding VIII, that there are no charges to be made against the amounts apportioned to The Adamant Company or Walter B. Scoville in the Federal condemnation distribution trial, designated No. 2454-HW Civil; and in failing to find that the obligation of Walter B. Scoville and The Adamant Company to pay to these appellants the sum of $10,000.00, with interest, constituted a charge upon the portions of the condemnation award allotted to The Adamant Company and Walter B. Scoville in said trial, and set forth in said Finding VIII.

II.

The Court erred in its finding (Finding XIII) that it was not the intention of the parties to the agreement under which said $10,000.00 was to be paid that the obligation to pay said sum should be a charge upon the production of the well, or any rights therein of the obligors Walter B. Scoville or The Adamant Company, and in finding that it was their intention that the obligation to pay said sum of $10,000.00 should be the personal obligation of Walter B. Scoville only.

III.

The Court erred in finding, if it did so find, that said agreement was made only by Walter B.

Scoville, and not *be* Walter B. Scoville and The Adamant Company.

IV.

The Court erred in its conclusion of law (Conclusion VII) in concluding that the obligation of Walter B. Scoville as a party to the agreement of September 27, 1938, to pay the plaintiffs in intervention the sum of $10,000.00, was a personal obligation of Walter B. Scoville only, and that such obligation did not give the plaintiffs in intervention, or any of them, any interest in [270] or charge upon the production of said well, whether by way of security for the payment of said sum of $10,000.00 or otherwise; and in concluding that said obligation is barred by the statute of limitations of the State of California, specifically by the provisions of Section 337 of the Code of Civil Procedure of said state.

HOGE & PERRY,
/s/ By FULTON W. HOGE,
Attorneys for Appellants Herschel Bullen, Mary H. Bullen, J. C. Hayward and Marian S. Hayward. [271]

Affidavit of Service by Mail attached. [272]

[Endorsed]: Filed July 27, 1955.

[Title of District Court and Cause.]

ORDER EXTENDING TIME FOR FILING RECORD AND DOCKETING APPEAL

On motion of defendants appearing through their counsel ex parte, the Court being fully advised, it is ordered that the time for filing the record on appeal with the United States Court of Appeals for the Ninth Circuit, and for docketing therein the appeal taken by defendants by notice of appeal filed July 12, 1955, is extended to September 21, 1955, pursuant to Rule 73(g) of the Federal Rules of Civil Procedure.

Dated: August 9, 1955.

/s/ PEIRSON M. HALL,
United States District Judge [276]

[Endorsed]: Filed August 9, 1955.

[Title of District Court and Cause.]

STATEMENT OF POINTS ON APPEAL BY APPELLANTS G. de BRETTEVILLE AND TREASURE COMPANY

Come Now the Appellants G. de Bretteville and Treasure Company, a corporation, and pursuant to Rule 75(b), Federal Rules of Civil Procedure, state the following points upon which they will rely in the prosecution of the appeal heretofore taken by them in said cause from the Judgment entered by this Court on May 24, 1955.

I.

The Court erred in its finding (Finding IV) that Walter [279] B. Scoville did advance the sum of $13,000 to Treasure Company for the completion of Treasure Well No. 8, and that such funds were advanced prior to completion of said Well on or about December 7, 1938.

II.

The Court erred in failing to find that there is no evidence in this lawsuit which supports the allegations set forth in Paragraphs IV and V of the Second Cause of Action of the Complaint filed herein, that Walter B. Scoville advanced to Treasure Company and to G. de Bretteville between May 15, 1938 and December 15, 1938, the sum of $13,000 for placing said Treasure Well No. 8 on production, or otherwise, or at all.

III.

The court erred in failing to find that G. de Bretteville was not a party to the joint venture for the development of said Treasure Well No. 8.

IV.

The Court erred in failing to find that there is no evidence in this lawsuit that G. de Bretteville has any liability to Treasure Company for personally withholding any moneys which are the property of Treasure Company.

V.

The Court erred in its Conclusion of Law (Conclusion VIII) that Treasure Company and G. de Bretteville are indebted to Walter B. Scoville and

to The Adamant Company for $13,000 advanced for completion of Treasure Well No. 8.

VI.

The Court erred in failing to conclude as a matter of law that G. de Bretteville is not liable for any debts of Treasure Company to Walter B. Scoville or The Adamant Company, if such indebtedness exists, on the ground of alter ego or as a joint adventurer, or otherwise, or at all. [280]

VII.

The Court erred in failing to conclude as a matter of law that the stipulation of counsel entered into in open Court in a previous state court action, as set forth in Paragraph II of the Second Cause of Action in the Complaint herein, does not constitute an admission in this lawsuit that either G. de Bretteville or Treasure Company owes to Walter B. Scoville or to The Adamant Company the sum of $13,000, or any part thereof.

/s/ By JOHN H. RICE,
Attorneys for Appellants G. de Bretteville and Treasure Company [281]

Affidavit of Service by Mail attached. [282]

[Endorsed]: Filed August 30, 1955.

[Title of District Court and Cause.]

ORDER EXTENDING TIME FOR FILING RECORD AND DOCKETING APPEAL

On motion of defendants appearing through their counsel ex parte, the Court being fully advised, it is ordered that the time for filing the record on appeal with the United States Court of Appeals for the Ninth Circuit, and for docketing therein the appeal taken by defendants by notice of appeal filed July 12, 1955, is extended to October 10, 1955, pursuant to Rule 73(G) of the Federal Rules of Civil Procedure.

Dated: September 20, 1955.

/s/ LEON R. YANKWICH,
United States District Judge [290]

[Endorsed]: Filed Sept. 20, 1955.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, John A. Childress, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered 1 to 290, inclusive, contain the original

Amended and Supplemental Complaint;

Answer to Second Amended and Supplemental Complaint;

Order of Reference and Appointment of Special Master;

Report of Special Master;

Motion and Notice of Motion for Leave to Intervene;

Affidavit of Fulton W. Hoge in Support of Motion to Intervene;

Opposition to Motion for Leave to Intervene;

Complaint in Intervention;

Answer of Defendants in Intervention;

Answer of Defendant, Treasure Company, a corporation, to Complaint in Intervention;

Decision;

Findings of Fact and Conclusions of Law;

Judgment;

Notice of Appeal; (by Plaintiffs in Intervention);

Order Extending Time to Designate Record on Appeal;

Notice of Appeal; (by defendants);

Designation by Appellants Bullen, and Hayward of Record on Appeal;

Statement of Points on Appeal by Appellants Bullen and Hayward;

Designation by Appellees Walter Scoville and Adamant Co. of Additional Record on Appeal;

Order Extending Time for Filing Record on Appeal;

Motion to Extend Time on Appeal;

Statement of Points on Appeal by G. de Bretteville and Treasure Co.;

Designation by Appellants G. de Bretteville and Treasure Co.;

Designation by Appellees Scoville and Adamant Co. of Additional Record on Appeal;

Motion to Extend Time for Docketing Appeal;

Order Extending Time for Filing Record and Docketing Appeal; which together with three volumes of Reporter's Transcript of Proceedings in this Court; and the complete proceedings in the District Court of Appeals, Fourth Appellate District, State of California; Plaintiff's Exhibits 1 and 2 and Defendants' Exhibits B-1—B-6, inclusive, all in above cause, constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing the foregoing record amount to $4.00 (for combining the two records), which sum has been paid by appellants.

Witness my hand and the seal of said District Court, this 12th day of October, 1955.

[Seal] JOHN A. CHILDRESS,
Clerk

/s/ By CHARLES E. JONES,
Deputy

In the United States District Court for the Southern District of California, Central Division

No. 1761-PH—Civil

WALTER SCOVILLE, et al., Plaintiffs,

vs.

G. de BRETTEVILLE, et al., Defendants.

HERSCHEL BULLEN, et al.,
Plaintiffs in Intervention,

vs.

TREASURE COMPANY, et al.,
Defendants in Intervention.

TRANSCRIPT OF PROCEEDINGS

Los Angeles, Calif., Tuesday, Jan. 18, 1955

Honorable Leon R. Yankwich, judge presiding.

Appearances: For the Plaintiffs: Leland J. Allen, 1200 Equitable Life Bldg., Los Angeles 13, Calif. For the Plaintiffs in Intervention: Hoge & Perry, by Fulton W. Hoge, 908 Security Title Insurance Bldg., Los Angeles 14, Calif. For the Defendants: John H. Rice and Max G. Kolliner, 900 Wilshire Blvd., Los Angeles 17, Calif. [2*] * * * * *

The Court: All right, gentlemen.

Mr. Hoge: Mr. Bullen, will you take the stand, please?

I will call Mr. Herschel Bullen, your Honor.

---

* Page numbers appearing at top of page of original Reporter's Transcript of Record.

HERSCHEL BULLEN

called as a witness on behalf of the Plaintiffs in Intervention, having been first duly sworn, testified as follows:

The Clerk: State your name in full, please.

The Witness: Herschel Bullen.

The Clerk: Spell your first name.

The Witness: H-e-r-s-c-h-e-l.

The Clerk: And your last name?

The Witness: B-u-l-l-e-n.

The Clerk: And your address, please.

The Witness: Residence, 192 East First North, Logan. Business, 12 West Center, Logan.

The Clerk: What city?

The Witness: Logan City, State of Utah. [29]

Direct Examination

Q. (By Mr. Hoge): Mr. Bullen, you are one of the plaintiffs in intervention in this matter?

A. Yes, sir.

Q. Are you acquainted with Mr. Walter Scoville, Walter B. Scoville?

A. For over a period of many years, yes, sir.

Q. Did you have a business transaction with him back in 1938? A. Yes, sir.

Q. And was that transaction evidenced by any memorandum or written document?

A. Yes, sir.

Q. I will show you a photostatic copy of a letter, addressed to Mr. George Halverson, dated September 27, 1938, marked Petitioner's Exhibit 1, for

(Testimony of Herschel Bullen.)

identification, and ask you if that is the document to which you refer? A. Yes, sir.

Mr. Hoge: Your Honor, the original one that was introduced in the other case has apparently been misplaced. I would like to use this photostat here, if I may.

The Court: All right.

Mr. Allen: I don't understand, your Honor. The original was introduced in this other court case.

Mr. Hoge: I will bring that out.

Mr. Allen: It is a supposed copy.

Mr. Hoge: Your Honor, I will bring that out.

The Court: At any rate, are you satisfied with its authenticity?

Mr. Allen: That I don't know.

Mr. Hoge: Oh, excuse me. I should have shown it to you, counsel.

(The document was handed to counsel.)

Mr. Hoge: Will you mark this?

The Clerk: Plaintiff's B-1, for identification.

(The document referred to was marked Plaintiff's Exhibit B-1 for identification.)

Mr. Allen: I don't know. It is difficult. I think it is objectionable, your Honor. The original was used in the County court.

Mr. Hoge: I have not offered it yet. I want to do some more qualifying of it.

The Court: Of course, if an original is not available, a photostat copy, or even a copy, if the witness identifies it, may be used. Even if it is an ordinary copy, that would take the place of it.

(Testimony of Herschel Bullen.)

Q. (By Mr. Hoge): Mr. Bullen, would you state whether or not that is a copy of the document that you wrote to Mr. Halverson? [31]

A. Yes, sir. That bears my signature. That is the document, or a copy of the document.

Q. Do you recall at the time your deposition was taken, we introduced a document which was a carbon copy of the original letter?

A. Yes, sir.

Q. And that we were unable to find the original of that document? A. Yes, sir.

Mr. Hoge: I believe I served you with a copy of a notice to produce the original, counsel.

Mr. Allen: I have never had the original.

Mr. Hoge: Yes. However, I served you with a notice to produce it.

Mr. Allen: Yes, but where is deposition that has the copy? This is so involved that it is difficult to read it at all.

Mr. Hogue: Well, there is a copy which was typed as an exhibit to the complaint.

May I state briefly what happened, your Honor, for the information of the court? The original of this letter agreement was lost. Nobody was able to find it. Mr. Bullen had a written copy, which bore the signature of Mr. Scoville, and that was introduced in evidence before Judge Beaumont. This is a photostatic copy of that, and that document, which [32] was introduced before Judge Beaumont, is missing. It is not in the exhibits of the case. I don't know what happened to it. That went up to

(Testimony of Herschel Bullen.)

the Circuit Court of Appeals. It may have got lost up there. I don't know what happened to it.

Mr. Allen: That is the copy I had reference to, that was introduced, and you are unable to find that one?

Mr. Hoge: I am unable to find it, and this is a photostatic copy of the one that was introduced before Judge Beaumont.

The Court: In view of that statement, I will overrule the objection, and it may be received.

The Clerk: The exhibit will be marked as B-1 for the intervenor.

(The document heretofore marked Plaintiffs in Intervention Exhibit B-1 was received in evidence.)

Q. (By Mr. Hoge): Mr. Bullen, what happened to the original of this letter?

A. I don't know. It was mailed to George Halverson, the attorney, in Los Angeles.

Q. Did you have a carbon copy of it?

A. Yes, sir.

Q. And was that carbon copy signed by anyone?

A. It bore the signature of Walter B. Scoville, and The Walter B. Scoville Company.

Q. Is this a photostat of that carbon copy? [33]

A. Yes, sir.

Q. Down below the letter there is stated, "We agree to the foregoing," and then appear what purport to be certain signatures. One of them is "Walter B. Scoville." Will you state whether or not you know his signature?

(Testimony of Herschel Bullen.)

A. Yes, sir, that is Walter B. Scoville's signature.

Q. And that was on this copy?

A. And "The Walter B. Scoville Company, by Walter B. Scoville," yes, sir.

Q. Now, was any statement made to you by Mr. Scoville in regard to whether or not he had any authority to commit the operator of that well, or the lessee of that well, to a payment of $10,000 out of 15 per cent of gross production?

Mr. Rice: Your Honor, I object to that as hearsay, your Honor, insofar as Treasure Company is concerned.

The Court: You cannot prove agency by the declaration of an agent.

Mr. Hoge: I am not trying to prove agency. I am trying to prove his representations.

The Court: That does not make any difference. If the representations relate to agency, to the power to act for a group, it does not make any difference whether he makes a representation or not. This is not a suit to re-form an instrument, and it isn't a suit to set it aside on the ground of misrepresentation. You are relying on the instrument. [34]

Therefore, authority to enter into the agreement on behalf of a corporation or whatever the group was must be shown, and by declarations other than that of the agent.

A representation of an agent that he is an agent still requires proof of the agency, whether you call it a representation or not.

(Testimony of Herschel Bullen.)

Mr. Hoge: I don't offer that for the purpose of proving the liability of the Treasure Company on the agreement, but only to show the equities of the situation, that these people put their money in there for a definite——

The Court: Oh, no, equity is not nebulous. Equity has existed for 300 years, and, therefore, those principles have been established, and any representation as to agency would not go. Either he had the right to bind them, or he did not, and unless an equitable estoppel should arise, then you still have to show it by acts. There is such a thing as ostensible agency, under the law of California, but ostensible agency consists of acts done to induce others to believe that a person is an agent.

When I was on the Court of Appeals pro tem, on the State Court of Appeals, I wrote an opinion in Brea vs. McGlashan, 3 C.A. (2) 454, in which I held that by referring an inquiry to a particular person and having certain signs in the office indicating that the person had certain authority may induce action which may establish agency, but you cannot prove agency [35] by a representation of the parties.

Mr. Hoge: No. My theory is in the nature of an estoppel by a deed, then. Here is a situation when Mr. Scoville purported to bind this production from this well by the payment of certain money.

Now, the evidence apparently is that he had no authority to do so. In fact, that was one of the

(Testimony of Herschel Bullen.)

findings of Judge Westover. But my position is that he, having represented that he had authority, having purported to——

The Court: Oh, no, you cannot get behind the fact of an agent. Estoppel involves several things. It involves, first an act not on the part of the agent, but on the part of persons inducing others. And when you are dealing with the question of the authority of agency, you have to show that the corporation knew of this, and that they induced the person to rely on it, and that he relied on it to his detriment. Those are the elements of estoppel. You cannot change a lack of power to bind by calling it estoppel, and proving it by the acts of the agent.

Mr. Hoge: No, but I am speaking of the stoppel of the agent himself, your Honor, based on his representations that he had something which he didn't have. In other words, take the familiar case of estoppel by deed. If "A" owns only an undivided interest in blank acre, and he gives a deed purporting to convey the fee, then any interest that he has [36] will pass. He is estopped to claim that the instrument did not pass whatever he owned.

The Court: Oh, that is true. A man cannot take advantage of his own wrong. But that would not be binding on anyone but Scoville himself.

Mr. Hogue: That is all I offer it for, your Honor.

The Court: And as far as Scoville himself is concerned, that is all right.

Mr. Rice: Your Honor, I would like a stipula-

(Testimony of Herschel Bullen.)

tion from Mr. Hoge that we may have a continuing objection.

The Court: I beg pardon?

Mr. Rice: I would like a stipulation, your Honor, if I may, so that I won't have to make continuing objections.

The Court: I don't like those continuing objections. You can make your objections at the proper time. I already said that I am allowing it only as to Scoville, because the question may arise whether, so far as he is concerned, he is bound by a representation he made, but that would not apply to The Adamant Company, or anyone else but himself.

Mr. Hoge: So far as I am concerned, that objection may be deemed made to any similar question.

Q. Then will you answer the question, Mr. Bullen, as to what was said about Mr. Scoville's position in the enterprise, and what his authority was, if anything? [37]

A. He said that he was the—practically the boss of it, that he was the representative of the major interests in the well; that he, The Adamant Company, Mr. Seeple, and some other minor interests were in control; that he had put in $10,000, which had gone into the well under his control, but he hadn't arrived at the desired objective, that is, he hadn't brought the well in, and it required more money, in brief, $12,500 of actual cash, together with credit to buy tools, machinery, and so forth, for which he had arranged, and if he could get

(Testimony of Herschel Bullen.)

$12,500, the well at that time was at approximately 5,000 feet, down to what you would term a basement schist, and he submitted a log which he called a Schlumberger, or Schlumberger check, or something of that sort,—apparently an electric core.

The Court: They call it the Schlumberger test. He is a Frenchman who has a German name, and they pronounce it Schlumberger.

The Witness: That was something new to us Mormons in Utah.

The Court: It is a device in geophysics, whereby, I think, they explode dynamite in the ground and they follow a trail, and can tell something by it. I don't know exacty what it is.

Mr. Hoge: I have heard the name, Schlumberger, and I have seen the spelling, but I couldn't connect it together.

The Court: It is S-c-h-l-u-m-b-e-r-g-e-r. He is a a Frenchman who has a German name, like many Frenchmen. [38]

The Witness: This credit that he had in the $12,500 in his opinion would bring the well into production.

Q. (By Mr. Hoge): Now, excuse me for interrupting, but, Mr. Bullen, did he make you an offer, or did you bargain for what you were to get?

A. No, he made us an offer. I was going to get up to that.

He said that in order to continue his contract, or in order to fix it so we could make a whole lot of money, and that is what we wanted to make, that

(Testimony of Herschel Bullen.)

it looked apparently that it was a well that would produce 20,000 barrels a day, but he had to bring in, as I recall it, a well that would produce 200 barrels, and if he had that—200 barrels a day, and if he did that, then he would be interested, or would be in control or such control as he was in at the time, on 17 acres of contiguous territory, so that it looked good to us.

Then, in answer to its operations, he gave me to understand that it would be operated under him by a committee of Joe Seeple, Harry Wynn and G. de Bretteville, a committee that apparently had been approved for operations until it had accomplished the purposes prescribed by all of the interests.

Q. Now, did he say anything at that time, or did you know anything at that time about any difficulties that he might have been having with Mr. de Bretteville? [39]

A. He said that there was some difficulties with some of the other interests, but those interests were such that they would be overcome, and he would let me know when and if they were overcome. And he later gave me a letter to that effect.

Mr. Hoge: May I have the exhibits here, please?

(The documents were handed to counsel.)

Mr. Hogue: That is one exhibit that is still available.

Q. I will show you a letter dated October 20, 1938, signed "Walter B. Scoville," addressed to

(Testimony of Herschel Bullen.)

"My dear friends," and ask you if that is the letter to which you refer?

A. That is the letter, and we were dear friends.

Mr. Hogue: I will offer this as Exhibit——

The Clerk: B-2.

Mr. Hoge: ——B-2 for the petitioners in intervention.

The Court: It may be received.

(The document referred to was marked Plaintiffs in Intervention Exhibit B-2, and was received in evidence.)

Q. (By Mr. Hoge): Now, that was after you had sent down the money to Los Angeles; is that right? A. Pardon?

Q. That was after you had sent the money down to Los Angeles—— A. Yes, sir. [40]

Q. ——in accordance with this letter to Mr. Halverson? A. Yes, sir.

Q. I will show you photostatic copies of two cashier's checks and ask you if they were the——

Mr. Hoge: Do you want to see them, Mr. Allen?

(The documents were handed to counsel.)

Q. (By Mr. Hoge): I will ask you if these are the photostatic copies of the checks which were sent down with your letter, that is Petitioner's Exhibit A-1?

The Clerk: What do you mean by Exhibit "A"?

Mr. Hoge: What is our first exhibit?

The Clerk: B-1.

Mr. Hoge: Oh, ours are "B" then. Thank you.

Q. B-1?

(Testimony of Herschel Bullen.)

A. Yes, those are copies of the checks or drafts.

Q. And were those checks returned to the banks on which they were drawn,—the originals of those?

A. Yes, sir. We later borrowed them, and sent them down.

Q. And they were introduced in evidence in the other case, the condemnation case?

A. That's right.

Q. Are you familiar with Mr. de Bretteville's signature?

A. Yes. That looks to be an exact copy of the signatures that he later placed on letters that we received.

Mr. Hoge: I offer these checks in evidence, that is, the [41] photostatic copies.

The Clerk: Admitted, your Honor?

The Court: They may be received.

The Clerk: Exhibit B-3.

(The documents referred to were marked Plaintiffs in Intervention Exhibit B-3, and were received in evidence.)

Q. (By Mr. Hoge): At the time that letter, Exhibit B-1, was sent down with the checks, was any other document sent down with it?

A. There was a legal document for consent to transfer, I think it was called.

Q. An application to the Commissioner of Corporations?

A. An application to the Commissoner of Corporations.

Mr. Hoge: Do you want to see this?

(Testimony of Herschel Bullen.)

(A document was handed to counsel.)

Q. (By Mr. Hoge): I will show you a document here, which is a photostatic copy of an application to the Commissioner of Corporations for consent to transfer in escrow, and ask you if that is the document that went down with this letter to Mr. Halverson?

A. Yes, sir, that is the document.

Mr. Hoge: Your Honor, this is a group of documents which contains a certification by the Commissioner of Corporations, which is in effect a chain of title of Mr. Scoville's [41] interest. It has the assignments from him.

The Court: I think it may be received in evidence as one exhibit. In argument you may refer to the particular ones.

The Clerk: B-4.

Mr. Allen: I would like to make this point at this time, your Honor, that we don't want to be bound.

The Court: I can't hear you.

Mr. Allen: The first exhibit, which calls for an assignment of 18-1/3 per cent, evidently that had been voided, because the next one in the list with 19 is correct, and the first one was never carried out.

The Court: All right. I will hear the arguments on it.

Mr. Allen: All right. Otherwise we have no objection to the exhibit.

The Court: All right.

(Testimony of Herschel Bullen.)

(The documents referred to were marked Plaintiffs in Intervention Exhibit B-4, and were received in evidence.)

Q. (By Mr. Hoge): Now, at the time you talked to Mr. Scoville, I understood you to say he was making this same offer to various other people?

A. Yes, sir.

Q. And that offer was what?

A. It was up to $12,500 was to be paid back two for one [42] out of the first 15 per cent of production, and to each individual who was contributing $2500, they were to receive one per cent participating royalty interests.

Q. Now, in regard to that agreement to repay at two for one out of production, did you make any inquiry, or did it occur to you as to whether or not that might be a usurious transaction?

A. Yes. It rather looked to us up in Utah as somewhat extravagant. We couldn't hardly feature how people could make so much money. We talked that over with our attorneys up there, Young & Bullen, Mr. Young in particular, who thought he could only apply—that he could not advise as to Utah law, and suggested that we consider it with some legal authorities in Los Angeles.

I asked Walter—when I say Walter, I mean Walter B. Scoville—I asked him who drew up the papers, the consent to transfer, and, as I recall it, he said Charles Franklin Johnson, with offices in the Subway Terminal Building.

(Testimony of Herschel Bullen.)

I happened to be down in Los Angeles a few weeks later on some other matters, and he introduced me to Attorney Johnson. I talked it over with him, and I had either prior to that time—if not prior, I did later write him a letter on the matter, along with some other things, to which he replied, and his advice in the matter was to the effect that under the circumstances and conditions it was not usurious. [43]

Mr. Hoge: Your Honor, I offer this letter from Mr. Johnson, not for the purpose of argument as to the accuracy of the opinion, or for the purpose of proving anything stated in it, but only to show that there was no intention on the part of these people to violate any usury law, and I think the opinion is correct, that it does not.

The Court: All right.

Mr. Allen: I object to the letter so far as Mr. Scoville is concerned on the ground that it is hearsay.

Mr. Hoge: I am not offering it for what it contains, but to show the bona fides of the investors.

The Court: Do I understand you to say that Mr. —who referred you to him, or who told you that Mr. Johnson had been retained?

The Witness: Walter Scoville.

The Court: Of course, when there is a reference to another person, then it is permissible. Overruled. It may be received.

The Clerk: B-5.

(Testimony of Herschel Bullen.)

(The document referred to was marked Plaintiffs in Intervention Exhibit B-5, and was received in evidence.)

Q. (By Mr. Hoge): When did you first meet Mr. de Bretteville, Mr. Bullen?

A. I didn't meet Mr. de Bretteville until after the well [44] had been taken over by Mr. de Bretteville, or his interests, or someone prior to the Scoville interests. I don't know, and I don't recall, but it was some time after that.

Q. Can you recall who was present at that conversation? A. The what?

Q. Who was present at the time you met Mr. de Bretteville?

A. I met him at—Dr. Hayward and I met him at the same time.

Q. Did you have any conversation with him in regard to your investment at that time?

A. With regard to what?

Q. With regard to the investment you had made in this well.

A. Oh, yes. But, come to think about it now, we made a special trip. Dr. Hayward, with Ernest T. Young of the firm of Young & Bullen, came down, and we telephoned to Mr. de Bretteville and made an appointment with him. That was after he had taken it over, and we called on him in relation to our interests.

Q. And can you state what was said about your interests at that time?

(Testimony of Herschel Bullen.)

Mr. Allen: I object to that as hearsay as far as Walter Scoville is concerned.

The Court: Overruled. It is limited to the persons involved. [45]

The Witness: What was the question?

Q. (By Mr. Hoge): What was the conversation with Mr. de Bretteville at that time with regard to your interests?

A. We told him first how we understood it, that we had invested $2500 each, to be paid two for one for one out of production, and we didn't get any satisfactory information out of de Bretteville, that we were to get anything.

Q. Well, did he say whether or not he had known about this two for one arrangement? What did he say about that?

A. I don't recall whether he said that he knew anything about it prior to that time or not.

Q. At any rate, you never got any payment from Treasure Company on account of your investment? A. No; no.

Q. Either your repayment of your money, or the royalty interest that you acquired?

A. None whatever.

Q. Did you ever get any payment from Mr. Scoville on account of it?

A. None whatever.

The Court: All right.

Mr. Hoge: Just pardon me a minute, your Honor.

The Court: I beg pardon?

(Testimony of Herschel Bullen.)

Mr. Hoge: I want to refer to my notes, if I may, just a second. [46]

The Court: All right.

Mr. Hoge: I believe that is all of this witness. You may cross-examine.

The Court: All right. Gentlemen, I did not want to interrupt you. You know I do not look at the clock, but this is a good time to quit. As you know, I have many additional duties as Chief Judge, so we will take our noon recess, so as not to break the continuity of the cross-examination.

Mr. Hoge: I am sorry, your Honor. I didn't realize it was so late.

The Court: That does not matter. Never look at the clock. Let me do that.

Mr. Hoge: All right.

The Court: Whenever I am ready to quit, I will let you know. Don't worry about it.

Mr. Rice: Your Honor, may I state that Mr. Moore, who is an accountant and a prospective witness for the defense, had a death in his family, and I don't know whether I will be able to get to him this afternoon or not. I think I can get to him tomorrow morning.

The Court: I don't know whether we will finish this today or not.

Mr. Rice: I didn't know whether——

The Court: Of course, we can always take a witness out of [47] order. I merely wanted the case started. Now, after this gentleman is finished, if you want to put on a witness out of order, who

has illness in the family, or for other reasons, I have no objection.

Mr. Hoge: Did I understand your Honor correctly this morning, that you wanted the case of the plaintiffs in intervention, as well as the defendants' case completed before we go on with the accounting action?

The Court: What do you mean, the accounting action? In a case like this, what is there to the accounting action?

Mr. Hoge: Well, we have a dual interest here, your Honor. We are intervening to seek relief against Scoville on the two for one agreement.

The Court: The question of the accounting is merely a question of figures. If there is an additional accounting to be made from that decree, then after the case is closed, we can keep it open until we receive additional testimony. In other words, in a case like this, you cannot try it piecemeal. I would present your prima facie evidence to show you are entitled to this relief, or the other relief, and not wait until they do proceed.

Mr. Hoge: I just wondered if our case on the two for one agreement was to be completely tried before the rest of it, or how.

The Court: In a case like this, they are all mixed up. [48] So I say put on whatever testimony you desire to produce to show you are entitled to an accounting. I don't think anybody disputes the question that you are entitled, in the abstract, to an accounting. Anyone who has an interest has a right to ask for an accounting, whether they are

directors of the corporation, or what their status is. The question they dispute is whether you are entitled to any money under the accounting.

Mr. Hoge: Our particular interests, or the plaintiffs in intervention are alined with the plaintiffs on that issue. You see, the plaintiffs in intervention have other interests in addition to the two for one.

The Court: All right. Then let them present their testimony on that issue, and then you may add to it.

Mr. Hoge: But I simply wanted to dispose of my claim on the two for one issue.

The Court: You cannot divide it. When issues like this are intertwined, you cannot split them. I try not to overlap, but, of necessity, it doesn't make any difference. Ultimately the case is not closed until all the evidence is in, no matter in what order you present it. But I suggest you present it in that manner. Many a time when there are counter-claims, and so forth, I say to the person who has the affirmative, "Don't offer your testimony in rebuttal to the counter-claim, but wait until they have offered it." [49] Except as to that, you may present everything you have.

Mr. Hoge: Yes, sir.

The Court: All right. 2:00 o'cock.

(Whereupon at 12:25 o'clock p.m., a recess was taken until 2:00 o'clock p.m. of the same date.) [50]

The Court: All right, gentlemen, proceed.

Mr. Hoge: Mr. Bullen, will you resume the stand, please.

The Court: All right.

HERSCHEL BULLEN

resumed the stand as a witness on behalf of the plaintiffs in intervention, having been previously duly sworn, testified further as follows:

Direct Examination—(Continued)

Q. (By Mr. Hoge): Mr. Bullen, during the conversations which you had with Mr. Scoville prior to sending your money down and making this investment, did Mr. Scoville tell you what his interest in the venture was?

A. Yes, he told us his interest was approximately, as I recall it, 19 per cent; The Adamant Company, of which his daughter was an officer, 25 per cent; Joe Seeple, 6 per cent; and Harry Wynn, approximately somewhere around 6 per cent.

Q. Did he say anything else in regard to those holdings of himself and his family?

A. Anything else? I don't understand what you mean.

Q. I mean, did he make any comment at all as to the [51] position of those holdings, or how they would affect your interests at all?

A. Oh, yes. Those holdings, they are approximately the majority holdings.

Q. Just what he said now, Mr. Bullen, if anything, about that.

A. He said, "We are the majority holders. You

(Testimony of Herschel Bullen.)

are safe, you are absolutely safe. If the well comes in, you will get your royalties, plus your two for one. If it is a failure, you will get your 80 acres over in Baxter Basin, and if there is any question, my own personal interest is sufficient to take care of you and myself."

Q. Did he at any time say anything about that 19 per cent of his being owned by anybody else?

A. No, never.

Q. Did he ever mention any claim of Mr. Seeple to that interest?

A. Not in connection with that interest. If he had, we would never have taken it, or never have given him our money.

Mr. Allen: I ask that last statement be stricken.

The Court: That last may be stricken.

Q. (By Mr. Hoge): When did you first hear of any possible claim that Mr. Seeple might have to that 19 per cent?

A. Not until we came to Los Angeles on this suit. [52]

Mr. Hoge: Your witness.

The Court: All right.

Cross Examination

Q. (By Mr. Allen): You related a statement made,—that you talked to Mr. Johnson, the attorney. A. Yes.

Q. At that time did Mr. Johnson tell you that he was not attorney for Mr. Scoville, nor for Mr. de Bretteville? A. Yes.

(Testimony of Herschel Bullen.)

The Court: What was the answer?

The Witness: Pardon?

The Court: Did you answer?

The Witness: Yes, I answered.

The Court: What did you say?

The Witness: I said, "Yes."

The Court: All right.

Q. (By Mr. Allen): Now, in reference to your conversation with Mr. Scoville, did he not tell you that your two for one would come out of the first 15 per cent production from Treasure Well?

A. Yes, sir.

Mr. Rice: Your Honor, I will object to this on behalf of the Treasure Company as hearsay. [53]

The Court: I will admit it as to the particular defendant, and I will see later on if it is tied to the others or not. Go ahead.

Q. (By Mr. Allen): And the two for one was not chargeable against any particular interest, was it? A. I think that's right.

Q. That's right. In other words, it was not chargeable to Mr. Scoville's personal interest, nor to Mr. Bodkin's nor to yours, nor to Mr. Hayward's; isn't that right? A. That's right.

Q. But it was to come out of the total production? A. That's right.

Q. And you understood that fully, didn't you?

A. Certainly, and Mr. Scoville was to get it for us.

Mr. Allen: I ask that last be stricken, your Honor, as a conclusion of the witness.

(Testimony of Herschel Bullen.)

The Court: That may be stricken.

Q. (By Mr. Allen): Now, you placed your money, —you sent it down on September 27, 1938, to Mr. Halverson, didn't you?

A. I think that's the date.

Q. And in that letter you requested that he send his bill for services to you, and you would remit for them—— A. I did.

Q. ——did you not? [54]

A. Yes, sir, that was providing he made the contract.

Q. Well, did he remit a bill to you?

A. No, it speaks for itself. I asked him to draw the contract and send the bill to us, and we would pay it.

Q. You would pay it. You employed him as your attorney, didn't you?

A. Well, to that extent, yes.

Q. Now, you have an action pending in the Superior Court involving this same issue, haven't you, against Treasure Company?

A. I think that's still there.

Q. Still there? A. Yes.

Q. That is on the two for one, and also on your income from the two per cent, is it not?

A. I think that's right.

Q. And that action is against Treasure Company, The Adamant Company, and Walter B. Scoville, isn't it? A. As I understand it.

Q. That is right, isn't it? A. I think so.

(Testimony of Herschel Bullen.)

Q. Yes. And that action, as far as you know, hasn't been brought to trial yet?

A. That's right. It hasn't been brought to trial, as far as I know. [55]

Q. That action was filed some time in 1939 or '40? A. Yes.

Q. Now, isn't it a fact, Mr. Bullen, that you and Dr. Hayward have received about $3500 from this two for one, or on the royalty per cents?

A. No.

Q. How much did you receive? A. Nothing.

Q. Didn't you receive $3500 from Mr. Bodkin's office?

A. We received some money on our contract that we sold,—a cash payment, and the balance to be paid in installments, for our interest.

Q. For your two per cent interest?

A. Whatever it was, our interest in the well.

Q. That is yours and Dr. Hayward's?

A. Yes.

Q. And that amount was $3500, wasn't it?

A. No.

Mr. Hoge: I have a letter from Mr. Bullen, which Mr. Bullen wrote, which may refresh his recollection, if you want to get the exact figure.

(The document was handed to counsel.)

Q. (By Mr. Allen): Just to refresh your recollection, Mr. Bullen, will you glance at that letter and see if you can now state? [56]

A. Yes, that's right.

Q. What is the figure, then, that you received?

(Testimony of Herschel Bullen.)

A. $3633 principal balance. No, that is principal and interest,—no.

Q. What is that figure? A. $3633 total.

Q. $3634? A. That is $1817 each.

Q. Each,—you and Dr. Hayward?

A. Yes.

Q. And you received that money, didn't you?

A. Received that money on that contract, yes.

Q. Now, after you talked with Mr. Scoville, as you have related, you came down to Los Angeles, did you not, and made an investigation?

A. Yes.

Q. And you knew the conditions that the well was being held under, did you not? You investigated that?

A. Well, not in particular. We knew from what Mr. Scoville told us, as I stated, that it was operated or supervised by Joe Seeple, and Harry Wynn, and Mr. de Bretteville.

Q. And in that consent to transfer——

Mr. Allen: May I have Exhibit B-4?

(The document was handed to counsel.) [57]

Q. I show you Exhibit B-4, and ask you to look at Page 4 of Exhibit B-4, the application for consent to transfer, and look at the bottom of the page, and I ask you whose signature this is?

A. That is Herschel Bullen's.

Q. Is that your signature? A. Yes.

Q. And under it, "Mary H. Bullen"?

A. Yes, sir.

Q. Is that in her handwriting?

(Testimony of Herschel Bullen.)

A. Yes, that is her handwriting.

Q. And is that J. C. Hayward's handwriting?

A. That's right.

Q. And is this Marian S. Hayward's handwriting? A. That's right.

Q. And that says, "The undersigned individuals, named in the foregoing Application as prospective transferees of the participating royalty interests therein described, do hereby certify that they have individually known Walter B. Scoville for a long period of time; that they are familiar with the condition of and facts relating to the above mentioned well; that they are familiar with the general plan of operation and that they desire to have transferred to them within escrow participating royalty interests in the amounts set opposite their names hereinabove." [58] A. That's right.

Q. You have investigated, and so you signed that; is that true? A. Yes.

Q. And at that time did you know that there was a so-called executive committee appointed under the contract of April 5, 1938, of de Bretteville and Seeple?

A. All we knew was what Mr. Scoville told us. I don't know whether you mean by the executive committee, Seeple and Wynn and de Bretteville. If that is what you mean, we knew it, yes.

Q. You knew that. And when you wrote Mr. Charles Johnson seeking the information, which you introduced a letter pertaining to, did you show any of that letter to Mr. Scoville, any part of it?

(Testimony of Herschel Bullen.)

A. I don't recall whether I did or not. I would have. He and I were close friends.

Q. You would have if you had happened to see him; is that it? A. Yes, that's right.

Q. In fact, when Walter Scoville first talked to you, one of your first conversations was up in—was at Ogden, or Logan City?

A. I think we talked first at Salt Lake. I think I met him one day at Salt Lake first at the Hotel Utah, and [59] he told me about it, and later came up.

Q. Didn't you tell him at that time that you were going down to California, and you would look the thing over?

A. No, I didn't at that time, but after he came to Logan, and he then asked me and Dr. Hayward to come, I told him I was coming down.

Q. And you would look it over?

A. Yes.

Mr. Allen: I think that is all.

The Court: All right. Do you desire to ask any questions?

Cross Examination

Q. (By Mr. Rice): Mr. Bullen, I believe you testified this morning that in your original conversations with Mr. Scoville, he told you that he needed $12,500 and also the establishment of some additional credit. Did I understand you to say that he told you that he had arranged for that additional credit?

A. Well, I don't recall just the words he used,

(Testimony of Herschel Bullen.)

but he said that that was forthcoming, tantamount to that anyway, because I know where he got it.

Q. Well, where did he get it?

A. He got it, as I understood it, from the Halverson boys.

Q. And that he represented to you was for the purpose of [60] completing the well?

A. Yes, certainly. That was all his representations were, for completion.

Q. Now, you spoke a moment ago of what Mr. Scoville had represented to you as the interest in the well, and you made some reference to 80 acres in some Basin, which you said he told you you would have in the event that the Treasure Well came in dry or was a failure? A. That's right.

Q. Would you explain what that reference was to the 80 acres?

A. Well, that is included in our letter to Mr. Halverson, where Walter Scoville, in the event the well was a failure he would give us, I think it reads, comparable interest in 80 acres in Baxter Basin, State of Wyoming.

Q. And that was acreage which he presumably owned himself, or controlled?

A. Either that, or the Scoville Company, which he controlled, certainly.

Q. I see. Mr. Bullen, did you then, in making this deal with Mr. Scoville, ever look to the Treasure Company personally for the repayment of this debt, or was it between you and Mr. Scoville individually? A. We looked——

(Testimony of Herschel Bullen.)

Mr. Allen: I will object to that as calling for a conclusion [61] of the witness, your Honor.

The Court: That is all right. Overruled. Go ahead.

Q. (By Mr. Rice): You may answer, Mr. Bullen.

A. We looked to the return of oil from the well on our two for one, which was to come out of 15 per cent of the first production from the well.

Q. Well, you have just testified that Mr. Scoville was guaranteeing to you that if the well produced nothing, he would give you a comparable interest in some other property. Did you understand that other property to belong to Treasure Company, or was that Mr. Scoville's personal property?

A. That was Scoville's personal property.

Q. So you were making a deal with him individually; is that right? A. That is——

Mr. Allen: I will object to that.

The Court: I will sustain the objection. That is an inference to be drawn by the court.

Mr. Rice: That is all, your Honor.

The Court: All right.

Mr. Hoge: I have one or two questions on redirect, your Honor.

The Court: Go ahead. [62]

Redirect Examination

Q. (By Mr. Hoge): Mr. Bullen, you testified that you received, I think, some $3700 from some source in relation to this matter? A. Yes.

(Testimony of Herschel Bullen.)

Q. Will you explain that transaction to the court, just what it was?

A. It was for and in consideration of the sum of $7000. We were selling our right, title and interest,—all the right, title and interest we had to our agreement for one per cent royalty and two for one out of the 15 per cent.

Q. In other words, all the interest that you had was being sold? A. That's right.

Q. And you got some money under a contract of sale, did you? A. Yes, sir.

Q. Then was there a default in that contract?

A. There was a default, and it was returned to us.

Q. So all your rights were returned to you?

A. All our rights were returned.

Q. I will show you a contract, dated the 30th of June, 1942, between Herschel Bullen and Mary H. Bullen, and J. C. Hayward and Marian S. Hayward, his wife, and Fred Witman. [63]

A. That's right.

Mr. Hoge: Do you want to see this?

Mr. Allen: Oh, yes. I will go over it as fast as I can. I think I have seen enough, Mr. Hoge.

Q. (By Mr. Hoge): I will show you this document, Mr. Bullen, and ask you if that is the sales contract to which you referred?

Mr. Hoge: Do you want to see this, Mr. Rice?

Mr. Rice: No, I know about that.

The Witness: That is the contract.

Mr. Hoge: We will offer this document as ex-

(Testimony of Herschel Bullen.)

hibit next in order of the plaintiffs in intervention.

The Court: It may be received.

The Clerk: B-6.

(The document referred to was marked Plaintiffs in Intervention Exhibit B-6, and was received in evidence.)

Q. (By Mr. Hoge): It was under this contract that the payments you have testified to were received, as payments on the purchase price of your rights, which were sold under this contract; is that right? A. That's right.

Q. And after that the purchaser defaulted?

A. Pardon?

Q. The purchaser defaulted in the payments?

A. That's right.

Q. And you notified him that all his interests were terminated? A. Yes, sir.

Q. And no other claim has been made by him to any of your rights?

A. No claim whatsoever.

Q. One more question. Do you know Mr. Seeple?

A. Yes, sir.

Q. J. Orville Seeple? A. Yes.

Q. Did you see him after you had put your money in, or before?

A. I saw him after. I don't think I saw him before.

Q. Have you had conversations with him about this well? A. Oh, yes.

Q. At any time did he make any claim to the 19 per cent interest of Mr. Scoville?

(Testimony of Herschel Bullen.)

A. Never.

Mr. Hoge: That is all.

Recross Examination

Q. (By Mr. Allen): Mr. Bullen, when this contract, Exhibit B-6, was [65] entered into, with whom did you negotiate?

A. Mr. Hoge negotiated it through Attorney Bodkin.

Q. Through Attorney Bodkin? A. Yes.

Q. And Attorney Bodkin at that time represented Treasure Company and G. de Bretteville, didn't he?

A. I assume that he did. Prior to that he did. I don't know whether he did then or not.

Q. This is dated June 30, 1942. Turning to Page 3 of this exhibit,——

Mr. Hoge: Mr. Allen, I will stipulate that Mr. Bodkin was representing, as far as I know, was representing Treasure Company and Mr. de Bretteville at that time.

Mr. Allen: I will accept that stipulation.

Q. I notice on Page 3, at the top of the page we find some initials there. That "G.deB.," is that Gustav de Bretteville?

A. Let's see. Yes, that is de Bretteville.

Q. And I suppose "J.C.H." is J. C. Hayward?

A. That is mine (indicating), and that is Dr. Hayward's.

Q. Under "G.deB." are your initials, and then comes "J.C.H."?

(Testimony of Herschel Bullen.)

A. And that (indicating) is my wife's.

Q. And your wife's, and Mrs. Hayward's, "M.S.H."?

A. Yes, that is Mrs. Hayward's. [66]

Q. Then I notice on Page 4 we find the initials "G.deB." Is that Mr. de Bretteville's initials?

A. It looks like it.

Q. The same on Page 5?

A. Yes, looks like it.

Q. Then on Page 6 we see several initials?

A. Yes. I take it they are the same.

Q. They are the same? A. Yes.

Q. G. de Bretteville, and yours, and "J.C.H.," Mr. Haywards, "M.H.B.," and "M.S.H." and "F.W."? A. Right.

Q. And I guess Page 7 also bears G. de Bretteville's initials on it, does it not? A. Yes.

Q. Then on Page 8 we find the same group of three initials,—— A. Right.

Q. Including G. de Bretteville? A. Right.

Q. And the same six initials on Page 10?

A. Right.

Q. Including G. de Bretteville's? A. Yes.

Mr. Hoge: You might notice, Mr. Allen, that the [67] obligations of the buyer under that contract was guaranteed by Mr. de Bretteville.

Mr. Allen: Yes.

Mr. Hoge: So he initialled any changes because he signed the guarantee attached to it.

Q. (By Mr. Allen): You never met this man, Fred Witman, did you? A. No, sir.

(Testimony of Herschel Bullen.)

Q. You don't know who he is? A. No.

Mr. Allen: That is all.

The Court: All right. Step down, Mr. Bullen.

(Witness excused.)

The Court: Call your next witness.

Mr. Hoge: I will call Dr. J. C. Hayward.

J. C. HAYWARD

called as a witness on behalf of the Plaintiffs in Intervention, having been first duly sworn, testified as follows:

The Clerk: State your name in full, please.

The Witness: J. C. Hayward.

The Clerk: Spell your last name.

The Witness: H-a-y-w-a-r-d.

The Clerk: And your address?

The Witness: 315 Boulevard is my residence, and my [68] business is 547 North Main, Logan, Utah.

Direct Examination

Q. (By Mr. Hoge): Dr. Hayward, you are one of the plaintiffs in intervention in this matter?

A. Yes, sir.

Q. And you, with Mr. Bullen, made the investment to which Mr. Bullen has testified?

A. Yes, sir.

Q. Your check for $2500 was sent down with that letter to Mr. Halverson? A. Yes, sir.

Q. Were you present at any of the conversations before this letter was sent down, in any of the discussions with Mr. Scoville?

(Testimony of J. C. Hayward.)

A. Yes, sir, a number of times.

Q. Can you tell the court, briefly, what Mr. Scoville represented to you about the matter at that time?

Mr. Rice: Your Honor, I would like to object again on the grounds that this is hearsay as to Treasure Company, and that this is incompetent and irrelevant to the issues of this case, inasmuch as the law of this case, which was decided by the Ninth Circuit Court of Appeals has held that the interests of Bullen and Hayward were a personal [69] undertaking of Scoville, and not of Treasure Company.

The Court: I will overrule the objection. I will admit it only as to those defendants, personal defendants, with whom the conversation was had. Go ahead.

The Witness: Would you mind reading the question, please?

(The question was read.)

The Witness: He said that he had invested some money in an oil well in the Venice or Del Rey, or some area in California, and that it had been drilled to a depth through which they had passed what they considered to be a very highly concentrated oil-gas zone, and that it had all the evidence of being a very high producing well if it were brought in, and that they had run out of funds, and he was authorized by a committee that was operating the well to raise funds, and, likewise, to raise materials

(Testimony of J. C. Hayward.)

on credit to bring this well in, and he was looking around for prospective investors.

Q. (By Mr. Hoge): Did he say what terms he was offering to the investors?

A. On our first visit I don't think he did, but subsequently he did, and the terms were that he would—he was in a position to offer a two for one repayment of any monies advanced, along with a one per cent participating royalty interest in the well. [70]

Q. Now, did you at any time after this investment was made, discuss the matter with Mr. de Bretteville? Did you make some trips down to Los Angeles after that?

A. Yes, not—I didn't come down until after the well was on production.

Q. Did you have any discussion, then, with Mr. de Bretteville about the matter?

A. Yes. On our first visit here, Mr. Bullen, and our attorney, Mr. Young, came down and met in Mr. Bodkin's office with Mr. Gass, Mr. Bodkin, and Mr. de Bretteville, and discussed the matter of the well, its production, and the payment of some of our monies, which we knew was due us and should have been paid before.

Q. Well, did you make any demand at that time, or any request for payment on the two for one agreement, so-called, that is, the repayment of your investment?

A. Yes, we asked why we hadn't been receiving it, and when we were going to start receiving it.

(Testimony of J. C. Hayward.)

Q. And do you recall what was said about that?

A. Oh, among other things,——

Mr. Allen: Your Honor please, I object to this as hearsay so far as Mr. Scoville is concerned. He was not present.

The Court: It is limited to the particular persons.

Mr. Allen: To the particular persons, very well.

The Witness: Mr. de Bretteville said he had no knowledge of any such a contract as far as raising funds was concerned, and he had no part in it, and it was up to us to look at Mr. Scoville, who had made the contract with us, for our money.

Q. (By Mr. Hoge): Was he speaking about the two per cent royalty at that time or the two for one? A. No, the two for one.

Q. He made no objection to the two per cent royalty?

A. As far as I know, he has never objected to the one per cent each of participating royalty.

Q. Do you know Mr. Seeple? A. Yes, sir.

Q. J. Orville Seeple? A. Yes, sir.

Q. Have you had any discussion of this matter with him after you made your investment?

A. As far as the two for one is concerned?

Q. Or in regard to any part of the matter.

A. Yes, I think it has been discussed with Mr. Seeple a number of times.

Q. Has your interest in the matter ever been mentioned in any of those conversations?

A. Yes.

(Testimony of J. C. Hayward.)

Q. Has he ever made any claim to the 19 per cent [72] royalty interests that were in the name of Mr. Scoville? A. Never.

Q. Has he ever made any other claim to the——

A. Not until today.

Mr. Hoge: Your witness.

Cross Examination

Q. (By Mr. Allen): Were you present at the trial of the condemnation action when Mr. Seeple testified as to owning the 19 per cent?

A. I think not.

Q. This was a jury trial before Judge Beaumont, in which Mr. Seeple took the stand and testified as to the ownership of the 19 per cent.

A. I was not present.

Q. You were not present? A. No.

Q. Have you read that transcript at all?

A. I think I have. I don't recall.

Q. That trial was back in 1949, and the transcript was written up, and Mr. Hoge had that transcript, didn't he?

Mr. Hoge: I object. That calls for a conclusion. I will stipulate I had it.

The Witness: I don't recall ever reading it, however. [73]

Q. (By Mr. Allen): You don't recall reading it? A. No.

Mr. Allen: That is all.

The Court: All right. Any further questions?

Mr. Rice: Yes, your Honor.

(Testimony of J. C. Hayward.)

Cross Examinaiton

Q. (By Mr. Rice): Dr. Hayward, I show you a photostatic copy of a letter, dated August 22, 1939, on the letterhead of the Budge Clinic of Logan, Utah, and ask you if that is your signature?

A. No, that isn't my signature.

Q. Is it the signature of anyone in your office?

A. I fancy that is the signature of the secretary.

Q. Would you examine the letter and see if it is a letter which you dictated?

A. Yes, I dictated this letter.

Q. At the time that you dictated this letter, did you confer with Mr. Bullen as to the contents of the letter?

A. Oh, we discussed it, yes.

Mr. Rice: Your Honor, I offer this letter into evidence as the Defendants' Exhibit A.

Mr. Allen: I object to it, your Honor, on the ground it is hearsay, it is a self-serving document, no proper [74] foundation laid, and that the letter is dated or purports to be dated August 22, 1939, which was nearly a year after they had remitted their money in this investment.

The Court: Just a moment. It is his interpretation of the contract,——

Mr. Allen: That is it.

The Court: ——and I cannot see that a letter addressed to a person by the witness, unless it was a part of a discussion of the matter, is material.

(Testimony of J. C. Hayward.)

Mr. Rice: Your Honor, we have lost the original of that letter.

The Court: That isn't the question.

Mr. Rice: No, I understand, but——

The Court: That isn't the point that is being made. The point that is being made is that this is a self-serving declaration. It is his interpretation and is giving directions and ordering from what funds it is to come. In other words, he is deciding this lawsuit for himself.

Mr. Allen: Usurping the powers of the court.

The Court: That is right. Later on, if there had been negotiations and they had agreed upon an interpretation of it, that would be different. Besides, he is ordering something to be deducted from somebody's account, who was not a party to this conversation at all.

Mr. Allen: That is right. [75]

The Court: Objection sustained.

Q. (By Mr. Rice): Mr. Hayward, I show you a typewritten copy of a letter dated January 4, 1940, addressed to Charles S. Gass, Esquire, attorney, in Los Angeles, which purports to be signed by you. Your attorney has stipulated that it may be entered into evidence as far as he is concerned. Will you look at that letter and see whether you wrote that letter?

Mr. Hoge: Counsel, my stipulation was that the copy may be used instead of the original. I waived any objection to that poin' only.

Mr. Allen: Are you offering this?

(Testimony of J. C. Hayward.)

Mr. Rice: I offer this letter, your Honor.

Mr. Allen: January 4, 1940 is the date.

Mr. Rice: I offer this letter of January 4, 1940, as an admission against interest insofar as the defendant Treasure Company is concerned.

Mr. Allen: I have the same objection to it, insofar as Adamant and Scoville are concerned, your Honor. It is an attempt to interpret the situation, it is self-serving, usurping the duties of the court, and hearsay.

The Clerk: That will be Exhibit B, for identification.

The Court: I don't see that this is an admission against interest. It is setting forth a contention made to a third party. [76]

Mr. Rice: The admission, your Honor, is the statement that he is not looking to anyone except Scoville.

The Court: Where is that?

Mr. Rice: May I show you the paragraph? I don't remember the paragraph.

The Court: Yes, show me where the paragraph is.

Mr. Rice: It is the next to the last sentence, your Honor, in the last paragraph. If he asserts an interest against Treasure Company, that is an admission against interest.

The Court: It may be received for the purpose only of whatever that may amount to. It is a possible admission of a contention that is contrary to the contention that he is making now.

Mr. Rice: Your Honor, on that ground would

(Testimony of J. C. Hayward.)

it be possible to have the other letter admitted, on that narrow ground of an admission against interest by the statements contained therein?

Mr. Allen: I don't think it is.

The Court: All right.

Mr. Rice: I was wondering if the other letter, on the same narrow ground, could be admitted?

The Court: I don't remember a similar thing there.

Mr. Rice: Could I see that letter, Mr. Clerk?

The Court: I don't remember anything similar to that there. [77]

Mr. Allen: I don't, either.

Mr. Rice: I had reference, your Honor, to the opening phrase in the next to the last paragraph, "This in no way makes you responsible."

The Court: Let me see it.

(The document was handed to the court.)

The Court: I think for that limited purpose that paragraph may be admitted, merely as implying a different contention than is being made now.

Mr. Rice: Thank you, your Honor.

(The documents referred to were marked Defendants' Exhibit A and Exhibit B, respectively, and were received in evidence.)

The Court: All right.

Mr. Rice: That is all.

The Court: Anything further from this witness?

Mr. Hoge: I believe not, your Honor.

(Witness excused.)

The Court: Let's have a short recess now before you call the next witness.

(A short recess.)

The Court: All right, gentlemen.

Mr. Hoge: May it be stipulated at this time that this well produced about $200,000 worth of oil in gross production after the investment made by the plaintiffs in intervention, [78] and before the condemnation of the property by the Government?

Mr. Rice: Yes, I think, Mr. Hoge, it was a little over $200,000.

Mr. Allen: I will stipulate it was $205,411.68.

The Court: Then you have it in dollars and cents.

Mr. Allen: That was in the hearing, your Honor, and that all of those monies were handled by Treasure Company and Mr. de Bretteville.

The Court: All right.

Mr. Hoge: My only purpose is to show that there was sufficient production to repay this investment out of the 15 per cent of the production of the well.

The Court: All right.

Mr. Hoge: Now, your Honor, there was some testimony in the hearing before Judge Westover by Mr. Halverson, to whom this letter agreement was addressed, Plaintiffs in Intervention B-1, the one that provides for the terms on which their investment was made, and we have a stipulation here to the effect that any testimony in that matter may be used as if it were his deposition in this case. I

did not want to clutter the record with the entire testimony.

The Court: Then you will have to pick out the portions and read them into the record.

Mr. Hoge: Yes, if you want me to, or I could simply refer to Mr. Halverson's testimony, and ask that it be [79] considered as a part of this. It isn't very long, and I will do whatever your Honor would think would be most convenient.

The Court: It does not matter. It all depends on whether there are a lot of extraneous matters. If it is brief, and there are not any extraneous matters, why, the deposition may be put into evidence, especially if there are no objections to any of the questions. If there are objections to any of the questions, it will have to be read, so that I can pass on the objections.

Mr. Allen: I don't recall a stipulation as to Mr. Halverson's testimony that I made.

Mr. Hoge: Mr. Allen, you stipulated that any part of the testimony in the condemnation case might be used in this case as if it were taken by deposition in this case. Do you recall that?

The Court: Let us identify it. That is too general, because how would I know which portions, unless my attention is called to it specifically in some manner, so that the record will show?

Mr. Hoge: Mr. Allen is questioning my statement about the stipulation, your Honor. I think I had better get him cleared up on that first, if I may.

Mr. Allen: I don't recall it, but possibly if you would read the part you want, I will stipuate.

Mr. Hoge: You have already stipulated, Mr. Allen. [80]

Mr. Allen: You mean in writing?

Mr. Hoge: Yes, sir. There is my copy of it (handing document to counsel).

Mr. Allen: Maybe you put one over on me.

Mr. Hoge: No, I don't think so. I believe the original is on file.

The Court: What is that?

Mr. Hoge: I think the original stipulation is on file.

The Court: If you have the copy of it, and you give the date of it, Mr. Stacey will help you locate the original.

Mr. Hoge: December 27, 1954.

Mr. Allen: Yes, I did. I admit that is my signature, your Honor.

The Court: Then that settles it.

Mr. Allen: That is right.

Mr. Hoge: This testimony of Mr. Halverson, your Honor, is at——

The Clerk: Where is it located, so that the Judge can find it?

Mr. Hoge: It is in Volume 3 of the record on appeal in the condemnation case. It commences on Page 1236.

The Clerk: Do we have it in the file?

Mr. Hoge: I don't know, sir, whether you have it or not. I will be glad to let your Honor have my copy of it.

The Court: It does not matter. If you are going to [81] read it into the record, I don't have to take the time to read it now, but if we are going to receive it, we will have to have a copy for the clerk.

Mr. Hoge: Yes, sir.

The Court: I will let you read it into the record.

Mr. Hoge: I am willing to give a copy to the clerk, if you want, or whichever your Honor thinks is appropriate.

The Court: I don't know. How long is this? It just depends on the time, that is all. How many pages is it? Why don't you pick out the portions you want, and probably we would gain time.

Mr. Hoge: It is only about seven pages of the record.

The Court: What?

Mr. Hoge: It is only about seven pages of the record.

The Court: Then why don't you read it?

Mr. Hoge: All right, sir.

The Court: Then I will get the continuity of it.

Mr. Hoge: Should I read both the questions and the answers?

The Court: Yes, that is right.

Mr. Hoge: All right, sir.

Mr. Allen: Do you object to my standing here?

Mr. Hoge: No.

(Thereupon the portion of the deposition of George Halverson referred to, was read in words and figures as follows, to wit:) [82]

(Deposition of George Halverson.)

"Q. (This is by Mr. Hoge): Mr. Halverson, do you recall in the Fall of 1938 whether or not you represented Mr. Water Scoville and The Adamant Company in any matters?

"A. I think it was a little earlier than that. I think it was as early as June. I am not sure. That was 1938.

"Q. I wish to show you Petitioner's Exhibit 1 in this matter, which is a carbon copy of a letter to you, dated September 27, 1938."——

That is Exhibit B-1 in this case, your Honor.

"A. I have seen this and read it over, and I am sure the original was in my possession, and possibly in my possession now somewhere.

"Q. Have you made a search of your files?

"A. I made a search on your behalf.

"Q. Were you able to locate the original of that?

"A. I was not able to locate it. I spent a half day looking up my old file and found the old file, but that letter was contained in my safe.

"Q. You were not able to find the original?

"A. No.

"Q. Do you recall having the original, however?

"A. I recall, without question.

"Q. I call your attention to the back of this letter, [83] the botton, on which is the statement, 'We agree to the foregoing,' and under that there appears to be certain signatures, and copies of sig-

(Deposition of George Halverson.)

natures. Will you state whether or not you recall what was on the original of that letter?

"A. Yes, sir, they were on the original. I am not sure whether they were on the original as it came to me, or whether it was signed afterwards in my office. My impression is it was before it came to me, but I am not sure as to that.

"Q. You will note there are two, in fact, there are three signatures there, Mr. Halverson, one of Mr. Walter B. Scoville, one of Walter B. Scoville Company by Walter B. Scoville. Do you recall whether they were on the original when you got it?

"A. My remembrance is that they were, Walter B. Scoville, The Adamant Company, Walter B. Scoville, and I believe the Walter B. Scoville Company, although I don't recall it. I have the old complaint that I had prepared at that time, and now in my hands or in my possession. I think there were three parties.

"Q. I call your attention to Petitioners' Exhibit 9 in this matter, the second paragraph of that letter, which states,—this is a letter from you to Messrs. Young & Bullen: [84]

" 'We have also under date of September 27, 1938, a letter addressed to us by Herschel Bullen and J. C. Hayward, directing on what terms the checks were to be turned over to the Treasure Company, and we merely had The Adamant Company and the Walter B. Scoville Company and Walter B. Scoville agree to the terms contained in that letter.' Is that a correct statement?

(Deposition of George Halverson.)

"A. That is a correct statement, I am sure. That is my signature, and I am sure the facts contained therein are true.

"Q. Will you state whether or not you can testify that the signature of The Adamant Company, by Helen Scoville, secretary, was on the original of that? "A. I can.

"Q. What is your answer to that? Was it or was it not? "A. It was on it.

"Mr. Hoge: That is all.

"The Witness: Of course, I didn't see her write it, but I know it was there.

"Q. (By Mr. Hoge): You saw the signature?

"A. It was produced by Mr. Walter B. Scoville.

"Q. Do you know Mrs. Scoville's signature?

"A. I don't think I know Mrs. Scoville. I know her father very well, but I don't think I know Mrs. Scoville. [85]

"Q. Do you know her signature?

"A. I wouldn't say that I do.

"Q. You say it was produced by Walter B. Scoville and The Adamant Company. What did he tell you about it, if anything?

"A. He just told me that was, I am sure, that it was the signature of The Adamant Company, by his wife, Helen Scoville.

"Q. Did he say anything to you in that connection?

"A. I can't remember that far back.

"Mr. Bodkin: It was stipulated yesterday that

(Deposition of George Halverson.)

that was her signature, and she was authorized to bind the company, according to my recollection.

"Q. Mr. Halverson, may I ask you, referring again to this letter,"—this is a question by Mr. Hoge again—"Petitioners' Exhibit 9 from Messrs. Young & Bullen, I ask you to read that second paragraph. "A. Yes, sir.

"Q. Can you state that you had in your possession the original of that document, signed and executed by The Adamant Company?

"A. It was on the letter from Herschel Bullen and Dr. Hayward, on the bottom of the letter. Yes, I had the original letter in my possession for many years, I know that. [86]

"Q. And did it have what purported to be the signature of The Adamant Company, by Helen Scoville, upon it?

"A. It did, yes, sir.

"Mr. Hoge: That is all.

"Cross Examination by Mr. Bodkin:

"Q. At the time that these letters you have referred to were written and received by you, were you representing Scoville and The Adamant Company?

"A. I was. I was representing—I have forgotten the title of the case that was brought, but the first case that was brought for declaratory relief. I went to your office, met with Walter B. Scoville, met Mr. de Bretteville there, and we discussed the question of compromise and the terms somewhat, the terms of resuming work on the well.

(Deposition of George Halverson.)

"Q. But later on that original case which you had filed as attorney for Scoville and The Adamant Company was dismissed?

"A. It was dismissed, yes.

"Q. And then some new arrangement was worked out at that time?

"A. A new arrangement was worked out before dismissal.

"Q. When that new arrangement was worked out, the [87] case was dismissed?

"A. Yes.

"The Court: Might I ask counsel a question?

"Mr. Hoge: Yes, sir.

"The Court: You have the letter signed by Scoville and by these corporations. Is there any record of any resolution authorizing anybody to sign these letters to bind the company in any way?

"Mr. Hoge: I don't know, your Honor.

"The Court: You bring in a letter by which you are attempting to bind the corporation. It seems to me before you bind the corporation you have got to show that party has the authority to bind the corporation. The usual way is to show a resolution by the Board of Directors; I don't know, or you might show a manager that had authority to bind the corporation.

"Mr. Hoge: In addition to that, your Honor, there is the fact that the corporation received the benefit.

"The Court: That is argument, but as far as

(Deposition of George Halverson.)

the record shows, there is no official action by the corporation.

"Mr. Hoge: That is correct, your Honor.

"Redirect Examination by Mr. Hoge:

"Q. Mr. Halverson, you say you represented Mr. Scoville and also represented The Adamant Company at that [88] time? "A. I did.

"Q. Do you know anything about the stockholdings of The Adamant Company at that time, and the officers of it?

"A. Helen Scoville was the president, and I don't recall who the other officers were at the present time.

"Q. Who owned the stock? "A. How?

"Q. Who owned the sotck of the company?

"A. It was my understanding she owned practically every share of the stock.

"Mr. Hoge: I think that is all.

"Mr. Bodkin: No further questions.

"Mr. Rice: Your Honor, yesterday afternoon I understood you had ruled that questions by Mr. Bodkin would serve both R.F.C. and Treasure Company. I was not present. There was an R.F.C. representative, and a deposition was taken, and so I thought it was not incumbent upon me to make the objections. Now that new evidence is being put on, I want it understood I don't have to go through the same procedure Mr. Bodkin has gone through.

"The Court: I am considering the two of you as one. You have to ride the ball in each case. I

(Deposition of George Halverson.)

don't think [89] you have more rights than he has.

"Mr. Rice: We don't assert any more, your Honor.

"Mr. Hoge: There is one more question I would like to ask.

"Q. I show you, Mr. Halverson,——

"The Court: The checks speak for themselves. There is no dispute as to where the money went.

"Mr. Hoge: But, your Honor, you reminded me of this question on what our position was.

"The Court: All right.

"Q. (By Mr. Hoge): Plaintiffs' Exhibits 3 and 4, do you recall seeing those documents?"

Off the record, your Honor, I offer this explanation, those are the two checks that are in evidence here as B-3.

"A. I recall seeing them. I saw them just before getting on the witness stand here. That is my signature and endorsement on the back in my handwriting in green ink.

"Q. Did you deliver those checks to anybody?

"A. I am not sure who—yes, I did.

"Q. Do you recall to whom you delivered them?

"A. I think I delivered them to Mr. Wynn, but I am not dead sure, but I know I made the endorsement on there to Treasure Company.

"Q. You had discussions with Walter Scoville about [90] this matter of delivering those checks, did you? "A. Yes, certainly.

"Q. Were they delivered to Mr. Wynn, or who-

(Deposition of George Halverson.)

ever got them, with the approval and consent of Mr. Scoville?

"A. I am certain they were."

Now, your Honor, there is a deposition which has been taken in this case of Mr. Walter Scoville. I understand he is not present here, and there are parts of that deposition which I would like to introduce also.

The Court: All right. Have you opened the deposition, Mr. Stacey?

The Clerk: No, your Honor. It is under seal.

The Court: Open it, please.

(The deposition referred to was opened by the clerk.)

The Court: All right.

Mr. Hoge: This deposition, your Honor, is about 27 pages long. As far as I am concerned, I would stipulate that it go in, on the understanding that it is the examination of an adverse witness insofar as I am using it, or, if your Honor would rather have me pick out the parts I particularly want, I would do that.

The Court: Examination of an adverse witness is not helpful unless you secure some admissions. Merely examining a man under Section 43 (b) or 2055 of the California Code of Civil Procedure is not helpful in itself. If there are any [91] admissions there——

Mr. Hoge: There are some there. That is what I want it for, your Honor.

The Court: Then the best way is to pick them out.

Mr. Hoge: Very well, your Honor.

The Court: Then they are in the record, you know, and unless they are contradicted, why, I can base a finding on them. So it is important to pick out what you want.

Mr. Hoge: I am sorry to take a little time, your Honor, but the reporters through some oversight of some sort did not provide me with a copy. I was not present when it was taken.

Mr. Allen: I was wondering, your Honor, since the deposition has been taken and perhaps the plaintiffs will have to tender it for any part they do not read, that——

The Court: I am willing to take it and read it, and I can read it very fast, but where he offers it merely under 43 (b), he may not want it all. If he wants to offer it in its entirety,——

Mr. Hoge: I think I will leave that to Mr. Allen. I have picked out a section at Page 24.

Mr. Allen: I think I will offer it in evidence, your Honor, and that will provide the entire testimony of Mr. Scoville. I will offer the entire deposition.

Mr. Rice: Your Honor, shouldn't it be read so that we can make any objections that we desire?

The Court: If you desire to object, yes.

Mr. Rice: I haven't had a chance to read it yet so as to determine whether I want to object.

The Court: Why don't you take it, and if there are any important admissions that you want, you

read them, and then you can offer it later on. I think that is the better way. For me to take it in its entirety, there has to be a waiver of objection, gentlemen. In other words, to use a homily expression, I think it is never a good judicial practice to "buy a pig in a poke," and if you take a deposition, and there are objections, and you do not pass on them, you are doing exactly that. Therefore, I think there should be a waiver. For instance, you know in admiralty cases many a time half of the testimony is by way of deposition, and we don't take the time to read them sometimes until a matter of some two or three months after they have taken the oral testimony, and that is the rule we apply.

Mr. Hoge: There are only three pages I want particularly, your Honor.

Mr. Rice: What page are you starting on?

Mr. Hoge: I am starting at Page 24. There had been some testimony with regard to conversations between Mr. Wynn and Mr. Seeple about raising money. This question begins on Page 24.

(Deposition of Walter Scoville.)

"Q. Then where was the next conversation you had [93] with Mr. Wynn and Mr. Seeple concerning the raising of funds?"

That is about the middle of Page 24.

"A. We were in constant touch"—this is Mr. Scoville's testimony, your Honor—"We were in constant touch with one another because that was all I was down there to do. After they received the authority to go ahead, we, Mr. Seeple and Mr.

(Deposition of Walter Scoville.)

Wynn and myself, definitely formulated plans of activity. We had formed the plans of securing credits, under the direction of Mr. Seeple and Mr. Wynn, and when that was accomplished and signed by the Treasure Company, we started raising cash funds for the project.

"Q. Were both Mr. Seeple and Mr. Wynn in agreement on this plan to pay back two for one on all funds raised?"

Mr. Rice: Your Honor, I will object to that question insofar as Treasure Company is concerned on the ground it is hearsay.

The Court: It is being admitted only as to the persons concerned.

Mr. Hoge: (Continuing reading:)

"A. Definitely.

"Q. Following these conversations in Los Angeles with you and the Committee of whom Mr. Seeple and Mr. [94] Wynn were members, did you then return to Utah? "A. Yes.

"Q. When was that? "A. In July.

"Q. Following your return to Utah is when you began negotiating with Mr. Bullen and Dr. Hayward? "A. Yes.

"Q. Following your negotiations with Mr. Bullen and Dr. Hayward, did Mr. Bullen then write this letter to Attorney Halverson which set forth terms of this agreement?

"A. No, that was in September.

"Q. It was following your visit with Mr. Bullen?

(Deposition of Walter Scoville.)

"A. He wrote the letter in my presence and Dr. Hayward's presence in Logan.

"Q. I understand, Mr. Scoville, a copy of that letter-agreement which has been referred to is on file having been attached as Bullen and Hayward in intervention in this matter.

"A. I understand so but I don't know. I have no way of telling."

Here again, your Honor, he is talking about Exhibit B-1, the letter of September 27, 1938.

The Court: All right.

Mr. Hoge: (Continuing reading:) [95]

"Q. When you said you okehed it, did you actually subscribe your name to it?

"A. Yes, right on the letter.

"Q. Did the Adamant Company also okeh that letter?

"A. Yes indeed. We okehed the terms and conditions under which those monies should be turned over.

"Q. Can you recall who signed for the Adamant Company at that time?

"A. No, I cannot.

"Q. I believe the document shows Helen Scoville signed for the Adamant Company. Was she an officer at that time? "A. She was.

"Q. Were you an officer?

"A. No, I have never been.

"Q. Who were the stockholders at that time?

"A. All of my children. It was formed in 1935 as an organization of the family.

(Deposition of Walter Scoville.)

"Q. Who is Helen Scoville?

"A. That is one of my daughters.

"Q. Were you present when she signed?

"A. I do not know.

"Q. You do know the Adamant Company agreed to it? "A. She had authority.

"Q. I believe in addition to signing for yourself, [96] you also signed for the Walter B. Scoville Company.

"A. That is right. The reason for that was I had given Mr. Bullen this agreement on Baxter Basin on 80 acres in the event this well did not produce and that belonged to the Walter B. Scoville Company.

"Q. So you put both the Walter B. Scoville Company and yourself in your individual capacity?

"A. That is right.

"Q. I believe you have testified, but I want to make sure, that you are not presently aware of the payment of the checks sent to Mr. Halverson by Mr. Bullen and Dr. Hayward to the Treasure Company.

"A. I was advised by Mr. Seeple that Mr. de Bretteville had received them.

"Q. And that money given was used in making a producer of the well? "A. Yes."

Now, I have skipped some matters in which I am not particularly interested at this time.

The Court: All right. Go ahead.

Mr. Hoge: Then at the bottom of Page 27:

"Re-cross examination by Attorney Olson:

(Deposition of Walter Scoville.)

"Q. Mr. Scoville, at the time you were having discussions with Mr. Bullen and Dr. Hayward about their investing money, did you advise them that the two [97] for one agreement was with the full knowledge and consent of the Treasure Company?

"A. That is right, through the Committee.

"Q. Through the Committee which Mr. Wynn was representing the Treasure Company?

"A. That is right."

The Court: All right. Any other documentary evidence of any kind?

Mr. Hoge: No, your Honor. I believe the plaintiffs in intervention rest at this time.

* * * * * [98]

J. ORVILLE SEEPLE

called as a witness on behalf of the plaintiffs, having been first duly sworn, testified as follows:

The Clerk: State your name in full, please.

The Witness: J. Orville Seeple.

The Clerk: Spell your last name.

The Witness: S-e-e-p-l-e.

The Clerk: And your address?

The Witness: 1525 North Van Ness.

The Clerk: What city?

The Witness: Los Angeles.

Direct Examination

Q. (By Mr. Allen): Mr. Seeple, what is your business or occupation? A. Oil operator.

(Testimony of J. Orville Seeple.)

Q. How long have you been engaged in that business? A. Thirty-five years.

Q. You have drilled how many wells in the Los Angeles Basin?

A. Oh, from 30 to 50, I don't know, in the Basin.

Q. In the Los Angeles Basin? A. Yes.

Q. Did you have charge of the drilling of this Treasure Well No. 8? [102]

A. I did.

Q. From the beginning of the drilling, or——

A. No, not from the beginning. From about the latter part of 1938.

Q. In the pleadings there is admitted a contract of April 5, 1938, in which you and Mr. de Bretteville are named as an executive committee. Do you recall that? A. Yes, I do. [103]

* * * * *

Q. (By Mr. Allen): Do you recall a meeting at the well some time in the Fall of 1938?

A. Yes, I believe I do.

Q. In which Mr. de Bretteville was present?

A. Yes.

Q. And Mr. Walter Scoville? A. Yes.

Q. And was Ollie Mays present?

A. I believe he was.

Q. And was F. L. Scoville present?

A. I believe he was. I am not sure, though.

Q. Was Attorney Charles Johnson present?

A. Yes.

Q. Now, will you relate, as near as you recall at this [104] time, the substance of the statements

(Testimony of J. Orville Seeple.)

made there by Mr. de Bretteville, and Mr. Scoville, and Mr. Charles Johnson, and those who took part in the conference?

A. There was a discussion as to raising more money to complete the well, and in that discussion it was in regards to the pay-back on a two and one-half or a two for one out of all of the production, or all of the interest, rather, of Mr. de Bretteville, Mr. Scoville, and The Adamant Company; all their interest was to pay back out of 15 per cent to the assignments of these per cents.

Q. They were to pay back out of 15 per cent of what? A. Of all of the production.

Q. All of the production?

A. Yes, all of the production belonging to, we will say, the Treasure Company, or de Bretteville, Walter B. Scoville, and The Adamant Company.

Q. And as to that 15 per cent, then, did Mr. de Bretteville make any statement in reference to that?

A. He didn't like to come in on that pay-back, but he eventually, I believe, he agreed to it.

Q. At that meeting? A. Yes.

Q. By the way, at that meeting do you recall any statement made by the attorney, Charles Johnson, in reference to the meaning of the cooperative clause in the April 5, [105] 1938, contract?

A. Yes. He called attention to the fact that the contract called for cooperation of all parties in interest, in any interests that they had in the completion of the well.

Q. Was anything said about what—what did he

(Testimony of J. Orville Seeple.)

say about that cooperation? What did it consist of?

A. It meant this, that we should all, our particular interests,——

Mr. Rice: Your Honor, I object to that as a conclusion of the witness.

Mr. Allen: Just state what he said.

The Court: What he said, yes.

Q. (By Mr. Allen): What Charles Johnson said with reference to that cooperative clause in the April 5, 1938, contract?

A. Charles Johnson called attention that each one of our interests should participate in the payback of that money advanced, as a cooperative situation.

The Court: All right. What was said by the others, then?

The Witness: Mr. Scoville agreed to it, and The Adamant and, finally, Mr. de Bretteville of the Treasure agreed to it.

Mr. Allen: I think that is all. [106]

* * * * *

Cross Examination * * * * *

The Witness: I had made other—I had worked—done a lot of work for Mr. Walter B. Scoville, and his brothers in Wyoming, and he owed me a debt, and when we first went into this deal in the Treasure Oil Company, I recommended that I thought that we could make a well out of it. Mr. Scoville had had it for three years, and told me——

Mr. Allen: You mean Mr. Scoville?

The Witness: I mean, Mr. de Bretteville had had

(Testimony of J. Orville Seeple.)

it for three years, and he could not keep the hole straight, and needed a lot of money, and he told me his sister, Mrs. Spreckels, wouldn't give him any more money, and wanted to know if I could raise the money. And I told Mr. Scoville about it, who happened to be here at that time from Salt Lake, and he became interested, and he put in $10,000 the first time, to go down and look at the sand, in other words, to see if it was a producing zone. And we had the Schlumberger run, which showed saturation. Then we needed more money, and in the agreement all parties were supposed to cooperate,—Mr. de Bretteville, Mr. Scoville, and The Adamant Company, to the completion of the well. But we raised part of the money from Mr. Bullen and Dr. Hayward, and some others, and we completed the well. I received no salary whatever.

* * * * * [114]

FRANCIS L. SCOVILLE

called as a witness on behalf of the plaintiffs, having been first duly sworn, testified as follows:

* * * * *

Direct Examination

Q. (By Mr. Allen): Mr. Scoville, are you a brother of Walter B. Scoville? A. I am.

Q. Do you recall a certain conference at the Treasure [117] Well No. 8 back in the fall of 1938?

A. I do.

Q. In the evening, and toward midnight?

A. I do.

(Testimony of Francis L. Scoville.)

Q. Do you recall who was present at that conference?

A. There was Walter B. Scoville, de Bretteville, and Johnson,——

Q. Attorney Johnson?

A. Attorney Johnson, and myself was there, and I know there were five that were there.

Q. You know there were five there?

A. Yes.

Q. Will you relate in substance what was said by Mr. de Bretteville, and Mr. Walter Scoville, and the different ones, and Attorney Charles Johnson, as nearly as you can recall at this time?

A. Well, Mr. Seeple at that time was in charge of the well, and they had gone as far as they could go with the $10,000 that Walter B. Scoville put up, and they needed more money, and they called the meeting to find out about the raising of more money, and who was responsible for it. And de Bretteville asked Attorney Johnson to read the contract, and to tell them who was responsible for furnishing the money. And this was done, and Attorney Johnson said that they should cooperate, and furnish the money, and after he had done that, [118] that any money raised would be paid back on a two to one percentage. And at that time Walter put up $1500, as I remember it, at that meeting, and de Bretteville said he would put his up the next morning.

Q. To refresh your memory, didn't Walter put

(Testimony of Francis L. Scoville.)

up only $500 and say he would put up the other $1000 when he got back to Salt Lake?

A. Well, that part, I don't know, but at that time he obligated himself for $1500.

Q. And de Bretteville said the same?

A. And de Bretteville said he would have his in the bank the following morning.

Q. What statement did de Bretteville make in reference to the pay-back of two for one?

A. Well, they wanted to finish the well. The way it stood there, it was doing no one any good, and they wanted to finish the well, and de Bretteville felt that Mr. Seeple was capable of finishing the well, and, consequently,——

Mr. Rice: Your Honor, I object to that.

The Court: What did he say about that?

Q. (By Mr. Allen): What did de Bretteville say about the pay-back of two for one?

A. He agreed to it.

Q. How did he agree to it?

A. He said he would agree to the two for one pay-back. [119] I heard that, and I know that.

Q. Out of production?

A. Out of production from the well.

Mr. Allen: Take the witness. [120]

* * * * *

Wednesday, Jan. 19, 1955, 10 a.m.

J. ORVILLE SEEPLE

recalled as a witness on behalf of the plaintiffs, having been previously duly sworn, testified further as follows:

* * * * * [132]

Cross Examination

Q. (By Mr. Rice): Mr. Seeple, I believe you testified yesterday afternoon that you had charge of the drilling operations at Treasure Well for a certain period. Would you tell us what that period was?

A. That period was from the time that we started work on the well until it was completed, and the oil in the tanks.

Q. When did you start work on the well?

A. Some time in 1938.

Q. Well, what time in 1938?

A. I think it was along in April or May. I am not sure. That's a long time ago.

Q. What time did you terminate your activities in connection with the drilling of the well?

A. When Mr. de Bretteville——

Q. Just what time of the year was it—the date?

The Court: He wants a date.

The Witness: Oh, along in December, of 1938.

Q. (By Mr. Rice): Do you remember whether it was the middle of the month, or the end of the month?

A. I believe it was around the middle of the month.

(Testimony of J. Orville Seeple.)

Q. Around the middle of the month?

A. Yes, but I am not positive.

Q. So that your testimony now is that you had charge of the drilling operations at Treasure Well from some period in April or May of 1938 up until a date in the middle of December, 1938; is that right? A. As far as I remember.

Q. Now, were you continuously in charge of drilling operations of Treasure Well during the period we have just talked about? A. Yes.

Q. In other words,——

A. Until the completion of the well.

Q. You were there, then, from the beginning date, which we will say was April or May, and you can't tell me any more definitely when you took over the job there, the commencement date?

A. There was an interval in between the time that the contract was made,——

Q. Which contract are you referring to?

A. ——when no work was done.

Q. Which contract are you referring to? [134]

A. The contract between The Adamant Company, Scoville, and the Treasure Company.

Q. Is that the contract which is known as the April 5, 1938, agreement? A. I believe it is.

Mr. Rice: That has been introduced into evidence by you, hasn't it?

Mr. Allen: It is in the pleadings, and admitted anyway, Mr. Rice. * * * * * [135]

Q. Now, at this meeting that I think you testified yesterday you attended, Mr. Scoville you say

(Testimony of J. Orville Seeple.)

was present, that is, Mr. Walter B. Scoville from Salt Lake City?

A. He was present at what date?

Q. At the meeting, Mr. Seeple, that you described yesterday afternoon.

A. Yes, he was present at our meeting.

Q. And I believe you testified yesterday that at that meeting there was an agreement reached to raise funds for the completion of the well on the two for one basis; is that right?

A. There were several matters discussed.

Q. Just answer that question for me, Mr. Seeple.

A. Yes.

Q. That agreement was reached at that meeting, and that agreement was reached between whom? Would you tell me between whom the agreement was reached?

A. Mr. de Bretteville and Mr. Scoville.

Q. And was Mr. Scoville,—I believe that Mr. Scoville, you have testified, is the trustee for your beneficial interest; is that right? [143]

A. That's right.

The Court: By the way, there are no pleadings whereby Mr. Seeple seeks in any fashion to have that fact established, are there?

Mr. Rice: I don't know, your Honor.

Mr. Hoge: No.

The Court: I beg pardon?

Mr. Hoge: He is not a party to this action, I believe.

(Testimony of J. Orville Seeple.)

The Court: I just wanted to make sure of that.

Mr. Hoge: Yes.

The Court: So that whatever agreement they have in regard to it is between them and does not require a ruling?

Mr. Hoge: It does not require a ruling here, yes, your Honor.

The Court: It does not require any ruling in this case. All right.

Mr. Allen: That is right.

Q. (By Mr. Rice): Did Mr. Scoville in discussions with you subsequent to this meeting confirm that it was his understanding that the agreement had been reached at that meeting on the two for one deal?

A. I don't remember whether it was at that particular meeting or not, on the two for one.

Mr. Rice: I thought you testified just a moment ago that that was—you testified to that yesterday, and I thought [144] you just reaffirmed your testimony, that at that meeting the two for one discussion took place.

The Court: There is a letter in longhand written by Mr. Scoville, which was produced yesterday, and I don't know whether it is dated subsequent to that meeting, in which he stated he felt an agreement had been reached as to all differences.

What is the number of that exhibit? That is an exhibit I read this morning.

It is Exhibit B-2, and it is dated October 20, 1933.

(Testimony of J. Orville Seeple.)

Was this meeting before October 20, 1938?

The Witness: Yes, it was.

The Court: He says, "It has taken a long time to get to this point, but barring any slips now, we will get started Saturday."

And he also says, "Just today we had our audience with Mr. Bodkin. He is agreeable to all procedure as we have outlined. There will be a final meeting tomorrow at 10:00 a.m. at which meeting all documents will be signed, the suit dismissed, the monies paid over and we will proceed in a peaceful, harmonious manner to complete the well."

So evidently that was his impression after this meeting. All right, go ahead.

Mr. Rice: May I see that just a moment, your Honor?

The Court: Yes. [145]

(The document was handed to counsel.)

The Court: It escaped me yesterday. I don't know whether you produced it, and I just didn't look at it. I don't think there was any objection and that is the reason, I think, that I did not look at it. I only looked at those as to which there was an objection. As I say, I examined it this morning, and that is evidently his summary on the topic. It does not mean anything, except that he says he felt that all differences had been adjusted.

Mr. Rice: This letter does not show to whom it is addressed. It says, "My Dear Friends."

Mr. Hoge: The testimony is that it was ad-

(Testimony of J. Orville Seeple.)

dressed to Mr. Bullen and Dr. Hayward, your Honor.

The Court: That is right. I don't know whether Dr. Hayward or Mr. Bullen so testified.

Mr. Hoge: Mr. Bullen testified.

The Court: Yes, Mr. Bullen testified. It was right at the beginning because it is Exhibit 2.

Q. (By Mr. Rice): This meeting, then, took place prior to this letter of October 20, 1938, Mr. Seeple? A. Yes, it did.

Q. Mr. Seeple, did you ever undertake to act for Mr. Scoville or for The Adamant Company in this activity of finding the funds to refinance this,—I mean to complete the well? [146] A. Yes.

Q. You did. And it is your testimony that this two for one arrangement was agreed to by Treasure Company, as well as by Mr. Scoville; is that right? A. It was agreed to, yes.

Q. That Treasure Company agreed with Mr. Scoville that monies that he could produce would be repaid out of the well two for one; is that right?

A. Yes, he agreed to it.

The Court: I have forgotten, but who appeared for Treasure Company at that meeting? Who spoke for Treasure Company?

The Witness: Mr. de Bretteville.

Mr. Kolliner: The testimony is that it was Mr. de Bretteville.

Mr. Rice: Mr. de Bretteville, your Honor.

The Court: Mr. de Bretteville. All right.

Q. (By Mr. Rice): Mr. Seeple, I show you a

(Testimony of J. Orville Seeple.)

photostatic copy of a letter, dated November 2, 1938, addressed to the Treasure Company, and bearing certain signatures. I will ask you if that is your signature? A. That is my signature.

Q. And those signatures are, "J. Orville Seeple," and "Walter B. Scoville, by J. Orville Seeple, His Agent," and "The Adamant Company, by J. Orville Seeple, Its Agent," is [147] that right?

A. That is right.

Mr. Rice: Your Honor, I would like to offer this in evidence as Defendants' Exhibit 2.

Mr. Allen: I object to it on the ground——

The Clerk: Defendants' Exhibit C.

Mr. Rice: "C", is it?

The Clerk: Yes.

Mr. Allen: ——on the ground that it is dated November 2, 1938. The document was introduced in evidence before in the trial in Judge Vickers' court, and is an exhibit in that case, and those files are here in this court, that is, the transcripts, and it was passed upon, and it is res judicata.

Mr. Rice: Your Honor, I am offering this letter for purposes of showing an admission against interest on the part of this witness, in that he has written that funds would be made available for the completion of the well, which we will show is a part of the——

The Court: Regardless of any question, it is admitted as proper cross examination, as possibly contradicting his statement as to who will make the monies available. The assumption is made here that

(Testimony of J. Orville Seeple.)
Seeple signs not only for himself, but also for Scoville. In fact, he signs for all three.

Mr. Allen: Yes, I know.

The Court: So it is a contemporaneous document that may [148] contradict what he says now, just as yesterday's document, produced by Dr. Hayward, shows that it could be interpreted as contradicting his statement on the witness stand, because in that letter he says that "We will hold Scoville personally responsible," despite the fact that he has tried to make us believe that all of the others are in on it.

I want to say this, gentlemen. I am going to follow very completely the rule of res judicata, and the things that have been adjudicated either by the other court or by Judge Westover will not be gone into again——

Mr. Allen: That is the point.

The Court: ——except as to such matters as to which parties were not before one or the other of the courts.

But on this point the question does not arise. It is merely that this is contradictory of his present statement. Furthermore, it shows that he was signing for everybody. So when he speaks of others agreeing to it, evidently he meant that he agreed, because here is Seeple talking for himself, and here is Seeple talking for Scoville, and here is Seeple talking for The Adamant Company.

Mr. Allen: Well, the agreement would be furnished under the agreement of the two for one.

(Testimony of J. Orville Seeple.)

The Court: I am not talking of the effect of it. Here is a man appearing in a triple capacity right here. Therefore, it may contradict what he is saying now as to what the [149] others said independently.

Why did not the others sign if they participated in this? Why did he sign for all three? Why didn't Scoville sign for himself, and why didn't Adamant sign through somebody else except this person? So this has a bearing upon his testimony.

It may be received.

The Clerk: Defendants' C.

(The document referred to was marked Defendants' Exhibit C, and was received in evidence.)

* * * * * [150]

GUSTAV de BRETTEVILLE

called as a witness under the provisions of Rule 43(b) of the Federal Rules of Civil Procedure, having been first duly sworn, testified as follows:

Direct Examination

* * * * * [157]

Q. (By Mr. Allen): Was Ina Cowan Kupperschmid employed by you? A. That's right.

Q. When? About when?

A. She was employed between—she never was employed by me. She was employed by the Treasure Company, and I think in 1934 or '35, through to about somewhere in '38.

(Testimony of Gustav de Bretteville.)

Q. What were her duties?

A. She was secretary.

The Court: May I ask what is the object of this inquiry?

Mr. Allen: Going into alter ego, your Honor.

The Court: What?

Mr. Allen: Going into alter ego.

The Court: What has alter ego got to do with this?

Mr. Allen: It is this, that he is a defendant here, and he operates these matters through his corporations, but he has full control of them, and as this one exhibit shows, he has a power of attorney to manage the corporation, with the duties that revolve to the directors. [163]

The Court: What *has to* do with the issues? What difference does it make whether it is his alter ego or not?

Mr. Allen: For this reason, that if there is a judgment, in order to reach things that we can show that he used this corporation for his own personal affairs.

The Court: That would release the corporation and make him personally liable.

Mr. Allen: Yes, and I think that is what we would like to do.

Mr. Hoge: May I say, as I understand the bearing of it, your Honor? May I mention that? I am interested with Mr. Allen, because we hold two per cent of the participating royalties. But, as I understand it, after this accounting was made by the

(Testimony of Gustav de Bretteville.)

Master, some of the physical assets that had been purchased out of the production of this well were sold by Treasure Company, and to complete the accounting the purchase price should be accounted for to the royalty holders, because their money, their pro rata portion of the money had paid for those assets, you see. So I think we are entitled to a judgment against Treasure Company for the value of those assets, or that it should be an item in the accounting. Now, if it appears that the Treasure Company does not have the money, and Mr. de Bretteville has it, I think that should be gone into.

The Witness: Oh, nothing like that happened.

Mr. Hoge: I don't know the facts, but I am stating the theory on which we are proceeding.

The Court: There was no objection, but I wanted to know how far we were going into the matter.

Mr. Allen: To show his complete management.

The Court: I want to tell you so far as alter ego is concerned, where a man has a directorate and he runs it as a corporation, and pays taxes as a corporation, that it is only in tax matters that you can disregard the corporate entity. You have to show that they had no will of their own, and received nothing, and so long as there are others who received dividends, if they were available, the alter ego theory does not get you anywhere. It is only in tax cases that you can disregard it, because under the law of California, which would govern,

(Testimony of Gustav de Bretteville.)

the mere fact that he has absolute control would not in itself be sufficient, but you would have to show that the others did not have a definite right to the stock, and that it was really a means adopted by him.

I just want to warn you that I am familiar with the doctrine. That is why I was asking the question. The mere fact that he was the moving head and had a power of attorney does not make the corporation his alter ego. The corporation still exists as an individuality.

Mr. Allen: I understand, your Honor.

The Court: And that is so even in tax cases. The best [165] proof of that is the opinion that I wrote in the F. Hugh Herbert case, where I held that even for tax purposes it could not be disregarded, and that the entity exists where separate books are kept and reports are made, such as required. For instance, I noticed among the exhibits the income tax returns were made by the corporation. When that is of record, you cannot get very far on the theory of alter ego. You might get somewhere on the theory that they have wasted the assets, you know, without consulting, and that is a different proposition.

Mr. Allen: I think I can even do that.

The Court: But so far as alter ego is concerned, I will give you this case. It is United States vs. F. Hugh Herbert, I believe. There the two men controlled the corporation, and the Government disregarded it, but it appeared they organized it, and

(Testimony of Gustav de Bretteville.)

athough they were in absolute control I held they had to be recognized. Of course, the Government has greater powers to disregard a corporate entity for taxation purposes than this court would have by holding a corporation which is organized under the State law not to be a corporation.

I will give you the correct citation of that case. It is the case of F. Hugh Herbert vs. Riddell, 103 Fed. Supp. 369.

Mr. Allen: Your Honor, I think I can show you where it is very material here if you will permit me to go ahead. [166]

The Court: All right.

Q. (By Mr. Allen): In what capacity was Ina Cowan Kupperschmid employed, —as secretary?

A. That's right.

Q. And was she a director of the company?

A. I am not sure. I think so.

Q. Yes. A. I think so.

Q. Do you recall this, that when she was appointed director of the Treasure Company that you had her sign a resignation as director and hand it to you at the same time?

A. No, I don't recall that.

Q. You recall her testimony, do you not, in the State Court in June in the Wynn case——

A. No, I don't.

Q. ——in which she made that statement?

A. No, I don't recall that, no.

Q. You don't recall that? A. No.

Q. Did you have E. Vaughn appointed a direc-

(Testimony of Gustav de Bretteville.)

tor of Treasure Company? A. I don't recall.

Q. You know, don't you, that you had E. Vaughn, your housekeeper, appointed director?

A. I am not sure. [167]

Q. How long was she with you?

A. Well, that I couldn't say.

Q. Do you remember testifying to that effect in June in the State Court, that E. Vaughn was a director of the Treasure Company?

A. No, I don't recall that.

Q. Just last June? A. Yes.

Q. Well, E. Vaughn was your housekeeper, was she not? A. Yes, that's right.

Q. And M. Jones was also a director, was she not? A. Yes, that's right.

Q. Did you appoint Harry Wynn a director?

A. I think that the company appointed Harry Wynn a director.

Q. And were you a director yourself?

A. That's right.

Q. While Harry Wynn was a director, isn't it a fact that no directors meetings were held?

A. Oh, we held meetings when Harry Wynn was a director.

Q. Did you ever hold a meeting with Harry Wynn as a director? A. That's right.

Q. You did? A. Yes, that's right. [168]

Q. When?

A. Oh, I couldn't tell you. We conducted the affairs of the corporation. When Harry Wynn was friendly to the corporation, from the time that he

(Testimony of Gustav de Bretteville.)

first came to work until somewhere in the latter part of 1938, or the fore part of 1939, or perhaps it was 1939, the latter part of 1939. I'm not sure.

Q. You passed on all of the bills of the Treasure Company, did you not? A. I usually did.

Q. Do you recall testifying in June in the State Court action that you never looked at the Treasure Company's books?

A. We employed an accountant, and I don't know—I have never had any training in accountancy, and I simply left it all to Mr. Moore, who was the accountant.

Q. You didn't look at the books?

A. I never interfered with him at any time.

Q. You didn't look at the books?

A. Perhaps if Mr. Moore called a particular item to my attention, or I asked about it, that would be the only time.

Q. I show you a resolution in Plaintiff's Exhibit 2, which is the audit of Claude I. Parker, on Page 2, that sets out the following:

"On June 24, 1938, at a directors' meeting held [169] and signed, I. Cowan, Secretary, the following resolution was adopted:

"Be it resolved that G. de Bretteville, the President of the corporation is hereby authorized, empowered, instructed and directed in the name and under the seal and as an act and deed of this corporation, to use and take all lawful ways and means in the name of the corporation or otherwise, to bargain, negotiate, contract, agree for, purchase,

(Testimony of Gustav de Bretteville.)

receive and take lands, tenements, hereditaments, and accept the seizing and possession of all lands, and all deeds and assurances in the law therefor, and to lease, let, demise, bargain, sell, remise, release, convey, mortgage and hypothecate, and in any way or manner deal in and with goods, wares and merchandise, equipment, tools, machinery and personal property, bills, bonds, stocks, notes, receipts, royalties, working interests, percentage interests, evidences of debt and such other instruments in writing of whatsoever kind and nature as may be necessary or proper to the premises. Also to negotiate loans, and borrow money with or without security; giving to the President, G. de Bretteville, full power and authority to do and perform every requisite necessary in his judgment as this Board of Directors would or could do."

Mr. Kolliner: I am going to object to the question, your Honor, on the very ground your Honor has indicated, that it is irrelevant whether the corporation did give him such authority.

The Court: He may ask the question. It may be received.

Q. (By Mr. Allen): Did you act under that?

The Court: Gentlemen, I still cannot see this. I have looked over the pleadings and I looked over the intervention, and I was just examining Judge Hall's memorandum on intervention. There are only two issues in this case. We have no power in a case, and the Federal Government has no right of visitation on corporations. You cannot dissolve

(Testimony of Gustav de Bretteville.)

a corporation. There are only two things in this lawsuit. First of all, there is an accounting, and the object of the accounting is twofold. An accounting may be asked where officers of a corporation have failed to account to persons who have an interest. Then we have them account. The other object is to determine what portion of the expenses should be deducted from the amounts found to be due by Judge Westover, so that the exact amounts may be determined.

We held in that opinion that the court cannot make an award. In that particular case the court could not make an award because there were equities between the parties which had not been gone into and which are the subject or the object of this lawsuit. So that the award was frozen. Not that Judge Westover could not have gone into the equities [171] of the thing in those proceedings before him, but the fact is he did not. So that a court of equity would go into the matter and determine what equities there are. As the opinion says, they may be entitled to receive more, or they may be entitled to receive less, and, also, because, although the court in the condemnation case could not recognize the individual unit holders, any more than a court in an action involving a corporation would recognize the stockholders, the court in an equity action could protect the interests by making a certain fund applicable.

Now, those are the only issues that are before us, and I cannot see that it makes any difference whe-

(Testimony of Gustav de Bretteville.)

ther the Treasure Company is an alter ego or not, —is the alter ego of Mr. de Bretteville or not. I cannot see how it affects the issues in this case. I cannot order the corporation dissolved.

Mr. Hoge: Your Honor, you apparently directed your remarks to me in connection with what I said a while ago.

The Court: I mean to anybody, all counsel in the case.

Mr. Hoge: I have a thought on that. As I said a while ago, I agree with your Honor about the case being returned here to adjust the equities between the parties, but this case happens to be a general accounting action by certain royalty holders against the operator of the well, the Treasure Company.

The Court: Yes. [172]

Mr. Hoge: And I think the effect of the judgment in this case will be twofold. It will find what the rights of the parties as between themselves are, and it will also release possibly the amounts that are held in the registry of the court, in Judge Westover's court, and may be readjusted as a result of the judgment here.

The Court: No, that will require further action on his part in the light of the judgment here.

Mr. Hoge: In the light of the judgment here. I mean this judgment will affect that.

The Court: That is right.

Mr. Hoge: And, in addition, there may be a judgment here against the operator of the well to

(Testimony of Gustav de Bretteville.)

account for money that it has not accounted for.

The Court: But what difference does it make, so long as he is an individual defendant,——

Mr. Hoge: Yes.

The Court: ——if he has in his possession funds which belong to the company, for which he has not accounted. He may be made to account for them regardless of the theory.

Mr. Hoge: Yes.

The Court: You have named them both.

Mr. Hoge: Yes. I am not advancing the alter ego theory——

The Court: Then you have to disregard the corporation, and you cannot say, "I will hold the corporation as to some, [173] and not as to the other." You have sued both of them.

Mr. Hoge: That is right.

The Court: I will stop further inquiry into the alter ego theory on the ground it is not material to the issues in this case. Furthermore, the evidence in this record and the testimony before the court shows that this corporation had an individual existence, and, therefore, this court would have no right to disregard that corporate existence in a collateral lawsuit.

If you want to impugn its existence, go into the State Court and have it done.

Now, let's go on to something else. besides, by making them an individual defendant, you have admitted the corporate existence, and, therefore, you cannot say, "I want to hold them as to some,

(Testimony of Gustav de Bretteville.)

and not as to the other." Either the corporation is his alter ego, and, therefore, they have no valid existence, and so they should go out as a cross-defendant, or whatever they are, in your lawsuit,——

Mr. Allen: They are defendants, your Honor.

The Court: ——or if they are not a defendant, then they must go out. You cannot blow hot and blow cold at the same time, and have your say that as to some they are liable, and as to others, he is liable.

Mr. Allen: I understand that.

The Court: All right. Then there will be no further [174] inquiry on the theory of alter ego.

Mr. Allen: There is no necessity, then——

The Court: It is not material to the issues, and cannot be gone into under the pleadings of this case.

Mr. Allen: I take it, there is no necessity, then, of making any offer of proof on the alter ego theory?

The Court: No, that shows exactly because you have not pleaded any alter ego theory in any pleading you have set forth.

Mr. Allen: Yes, I have.

The Court: Where?

Mr. Allen: In the first complaint filed in this case and it has not been demurred to.

The Court: Then if you do that, I will ask you to dismiss your complaint against the Treasure Company, and when you do, I will let you prove it, and then you will be in a mess, because if I

(Testimony of Gustav de Bretteville.)

find that they are not his alter ego, the corporation will be out.

Mr. Allen: If that is your ruling, your Honor, I will have to abide by it, and that is all.

The Court: The alter ego theory has no business in this accounting, so there is no further offer to be made along that line.

Mr. Allen: All right, your Honor.

The Court: I will rule that on the basis of the evidence [175] already in the record.

Mr. Allen: Yes.

The Court: Furthermore, this testimony is cross examination.

Mr. Allen: That is right.

The Court: You complete the examination, and I will rule on the facts. Go ahead and complete the examination.

Mr. Allen: In view of your ruling——

The Court: No; no. I am going to withdraw the ruling, and I am going to let you put in the facts, so if you have additional facts you will not be able to say that I did not allow you to elicit matters in contradiction of the record. So I will withdraw the ruling, and I will allow you to go into the alter ego theory.

Mr. Allen: The only angle to it is this, your Honor,——

The Court: No, that is my ruling.

Mr. Allen: Yes, but when we get through, if it is found that there are monies that should have been accounted for, and instead of being in Treas-

(Testimony of Gustav de Bretteville.)

ure's pocket, Treasure Company's, they are in his pocket, that is the only angle we are after.

The Court: But he is an individual defendant, and if he has money that belongs to the corporation, even though, under the power of attorney he has the right to collect the money, he has no right to keep it, so that having made him an individual defendant, the judgment of this court can reach him [176] regardless of the alter ego theory.

Mr. Allen: That is all I want, then. I will just ask him one question in reference to——

The Court: So if you want to prove the alter ego theory, go ahead and prove it.

Mr. Allen: That is all I want, your Honor, that ruling, and that statement satisfies me.

Q. Mr. de Bretteville, did the Treasure Company recover a judgment for $83,000 against the Union Oil Company and the RFC for damages, and including the value of the personal property of the Treasure well leasehold?

A. No, they only recovered a matter of somewhere around about $3500, the Treasure Company.

Q. Well, what was the judgment in that action? It was for $83,000, wasn't it?

A. The judgment was about $83,000. There was the Samarkand—most of the money was owed to the Samarkand. There was only about $3500 or less, because Mr. Bodkin settled or compromised the lawsuit for $70,000, and the Treasure Company got its proportionate part of what the judgment called for.

(Testimony of Gustav de Bretteville.)

There were some items in the lawsuit that—I think that there were four or five or six items that belonged to the Treasure Company that were recovered, and the rest of the items, some 60 items or thereabouts—I am not sure—[177] there were 50 or 60 items that were items that belonged to the Samarkand Oil Company.

Q. Well, were you suing for the equipment and personal property on all these properties?

Mr. Kolliner: Your Honor, I am going to object to this line of questioning on the ground it is not the best evidence. This witness is being asked to testify as to the contents of a court record and the judgment of a court; in fact, this court.

The Court: I think preliminary questions are proper to identify the existence, but what the judgment decreed is not a question of proof. As it relates to the State Court, the court can only determine upon examining the judgment. Why should a layman be asked to interpret to whom the judgment ran?

Mr. Allen: Well, the Treasure Company was the plaintiff.

The Court: It does not make any difference whether they were the plaintiff or the defendant. The judgment would tell what it amounted to.

Mr. Allen: That is true.

The Court: And not his recollection of it.

The Witness: I could get a copy of the judgment.

(Testimony of Gustav de Bretteville.)

The Court: Where is it? Have you got it here?

The Witness: No, but I can get it.

The Court: It is available. I think further inquiry on [178] that should be stopped because it appears that it is a judgment, and whether it was arrived at by compromise or in any other manner, the judgment speaks for itself, and a layman should not be asked in regard to it. It is not a contract where, if it is ambiguous, you can ask a man who was a party to state what they meant by it.

* * * * * * [179]

Cross Examination

* * * * * [180]

The Court: All right. Then on an accounting we don't need to go into that. Evidently, this is one of those fantastic oil deals with royalties, super-royalties, two-to-ones, very onerous contracts that were entered into in one way or another by people who had a little money when the other people are in distress. This is a contrary kind of a case. This isn't a case where somebody has been taken advantage of. It is a case where people have driven a bargain, and they want the benefit of their bargain. They may be entitled to it or not. I don't know. The contract will show whether they got what was coming to them.

So let's not go into side issues here. Each side wants to keep as much as possible, which is no more than human nature, but I don't want to go into all of these ramifications and complicate what

(Testimony of Gustav de Bretteville.)

is a simple lawsuit. This lawsuit is a simple lawsuit, and I am allowing you a lot of latitude because I am absolutely of the view that I could not make a proper finding contrary to the finding of Judge Westover, because all these people were before Judge Westover, and in that ancillary proceeding he had a right to determine it. But I am allowing you to put this in so that it can be argued, regardless of what the Court of Appeals said in the case is the law of the case, so that there is a foundation of [188] facts and a foundation in law to sustain certain findings to be made. That is why I am allowing you to go into it, and if I had done it the other way the case would probably have been ended by noon yesterday, because then there would have been very little to testify to.

So let's limit ourselves to the issues here and not go into side issues. Now, what is next?

Mr. Allen: Your Honor, I have nothing further of this witness. * * * * * [189]

Mr. Hoge: Q. Mr. de Bretteville, you have heard of this agreement with Mr. Bullen and Doctor Hayward, under which they were supposed to get their money back two for one out of fifteen per cent of gross production?

A. Yes, I believe that Mr. Scoville and Mr. Bullen and Hayward did have some sort of an agreement with——

Q. When did you first learn about that?

Mr. Rice: Will you talk a little louder, Mr. Hoge?

(Testimony of Gustav de Bretteville.)

Q. (By Mr. Hoge): When did you first learn about that?

A. It would be hard for me to pinpoint that time.

Q. Well, approximately?

A. Because it did not concern us, and so I didn't pay much attention to it.

Q. Do you recall having any discussions with Doctor Hayward or Mr. Bullen about it?

A. No, I didn't. I didn't meet Mr. Hayward or Mr. Bullen until some time in—I think it was the latter part of '39 or the early part of '40.

Q. That was after the well had been placed on production and had been running for some time?

A. Yes, that's right. [191]

Q. Did they talk to you about it then, and did they ask you why they weren't getting their money? Did they say anything about that?

A. I'm not sure. I'm not sure whether they ever did or not, but I think that there was some correspondence with them in the early part of 1940, and I believe the accountant sent them a statement.

Mr. Hoge: May I have that B-4 exhibit, Mr. Stacey?

(The document was handed to counsel.)

Q. (By Mr. Hoge): Mr. de Bretteville, I will show you a document which is a part of Exhibit B-4 here, which is an application to the Commissioner of Corporations for a consent to transfer certain royalty interests in escrow. I will call your

(Testimony of Gustav de Bretteville.)

attention to it, if I may. Do you want to read that by yourself? A. I would like to.

The Court: Read it to yourself.

Mr. Hoge: Have you finished yet? I think he is still on the first page, your Honor.

The Court: All right. You want him to read the entire document?

Mr. Hoge: I don't care. Apparently he wants to.

The Court: I think he has read enough. You see what question you want to formulate.

Mr. Hoge: I just want to ask him about a signature. [192]

Q. You see on Page 2 here, Paragraph II, it says: "Applicant, Walter B. Scoville, desires to assist in completing said well and certain of his friends and business associates are willing to advance the necessary funds, to be repaid two for one out of production."

A. Yes, I recall this.

Q. Do you recall this? You have seen it before?

A. Yes.

Q. I think you have been examined about it before, as a matter of fact?

A. Yes, I think so.

Q. And you see on Page 4 of this document, "Treasure Company, the issuer of the securities involved in the foregoing Application,"—that is, that these royalties are being transferred—"does hereby join in and consent to said Application. Treasure Company, by I. Cowan, Secretary."

A. Oh, yes, I recall this. In my absence Mr.

(Testimony of Gustav de Bretteville.)

Wynn induced Miss Cowan to sign this, and I was very much disturbed about it because of the fact that it did carry this language in there, and I took it up with Mr. Bodkin, and he said, "No, it's not that. It is just simply that the Treasure Company, by I. Cowan, the secretary, approved Mr. Scoville's"—that is, that we didn't object, the Treasure Company did not object to anything that they were doing, but that it was Mr. [193] Scoville's sole responsibility, and I believe that there is a court that ruled on that.

Mr. Allen: I object to this, your Honor, as being a conclusion of the witness.

The Court: That the court ruled on that may be stricken out. I mean, he has explained the presence of that statement there. All right.

Q. (By Mr. Hoge): What I want to know, Mr. de Bretteville, did you know that this arrangement had been made, did you authorize it, and did you approve it on behalf of Treasure Company?

A. No, we never did approve that at all. Mr. Wynn put this over on the Treasure Company.

Mr. Allen: I ask that be stricken as a conclusion of the witness.

The Court: We will strike that out. Anything further?

Mr. Hoge: I have nothing further.

* * * * * [194]

The Court: I will be glad to rule on the basis of the evidence in the case, and if you want to further examine this witness or offer other testi-

mony on the alter ego theory, I will allow you to do that, and we will determine later on what effect it may have upon your claim.

Mr. Allen: Here is my position, your Honor: When you state that any funds that he should have that belonged to the Treasure Company we can reach, I have no use in going further into alter ego.

The Court: All right. That is what this lawsuit is about.

Mr. Allen: That is all I care about.

The Court: You have sued him in his individual capacity, and an accounting being an equitable proceeding, the court may adjust accounts, and shuffle them, and reshuffle them, and tell this man to do this, and the other man to do that.

Mr. Allen: That is all I care about. I am perfectly satisfied with that ruling. [195]

The Court: You can do that. I am merely stating what your pleadings show, and what I can do.

* * * * * [196]

GUSTAV de BRETTEVILLE

called as a witness in his own behalf, and on behalf of other defendants, having been previously duly sworn, testified further as follows:

Direct Examination

Q. (By Mr. Rice): Mr. de Bretteville, there has been evidence introduced in this trial with respect to a meeting which took place at the drill

(Testimony of Gustav de Bretteville.)

site of Treasure Well, which was attended by Mr. Scoville, Walter Scoville, by his brother Francis Scoville, by Mr. Wynn, by Charles Franklin Johnson, an attorney, and by you, and in this meeting it has been testified that there was an agreement reached with respect to the furnishing of additional funds for the completion of Treasure Well on some two for one basis. Do you recall any meeting at the Treasure Well at which an agreement was reached for the furnishing of completion funds for the well on a two for one basis?

A. Never was a meeting of that kind.

Q. Do you recall a meeting at the well site at which the parties whom I have named were present on an evening? [200] A. In what year?

Q. Well, do you recall any such meeting during the year 1938? A. Yes.

Q. In what month of the year would that have been? A. That was in May.

Q. In May of 1938?

A. That's right.

Q. Will you tell us what transpired at that meeting?

A. Well, at that meeting Mr. Wynn and Mr. Charles Franklin Johnson and I came together, and it was for the purpose of clarifying the agreement of April 5, 1938, and Johnson had quite a discussion, and so did Wynn, as to whether or not they had to furnish the completion money.

The conversation was not satisfactory to me, and I objected to them interpreting the contract that

(Testimony of Gustav de Bretteville.)

they didn't have to furnish the necessary money to complete that well, because the well had been drilled, and the windup of it was that Mr. Scoville and Mr. Seeple went outside of this field office, and talked things over, and came back and said, "You can buy us out for what we have in the well." And that was the end of the meeting. That is the only meeting that we ever had at the well at any time.

Q. Was there any discussion at that meeting whatsoever about a two for one pay back or new funds to be furnished? [201]

A. No, never.

Q. Did you individually, or did you, as president of Treasure Company, at any time ever agree with Mr. Scoville that monies furnished by Mr. Scoville for the completion of the well would be repaid on a two for one basis?

A. Never.

The Court: Was there any such agreement in regard to money furnished by Mr. Bullen or Doctor Hayward, or did you know that they were getting money from those people?

The Witness: Yes, I learned about that while I was in San Francisco through correspondence, but I didn't know what the terms were, and I didn't know until I saw that agreement, a copy of which I read this morning, which refreshed my memory.

Q. (By Mr. Rice): You referred to the application to the Corporation Commissioner?

A. That's right.

The Court: Now, the units to be given to Mr.

(Testimony of Gustav de Bretteville.)

Bullen and Doctor Hayward were to come out of Mr. Scoville's share?

The Witness: Yes, providing that they were entitled to that share.

The Court: But you didn't know that he had made an agreement whereby they were to receive two for one for the rest?

The Witness: No, I didn't know that until I came back from San Francisco some week or ten days later.

The Court: Did you keep minutes of the meetings of the—[202] what is the name of the company?

Mr. Rice: The Treasure Company.

The Witness: The Treasure Company.

The Court: ——the Treasure Company?

The Witness: Yes, we did.

The Court: Have you looked to see if there is any record of any such meeting?

The Witness: Yes, I have.

The Court: Is there?

The Witness: No, there isn't.

The Court: Have you looked to see if there is any record where the Treasure Company was asked by you, or anyone else representing them, to approve any such agreement as is claimed was made by Mr. Scoville and the others at that meeting?

The Witness: No, there never was.

The Court: All right.

Q. (By Mr. Rice): Now, subsequent to this meeting to which you have referred as having taken

(Testimony of Gustav de Bretteville.)

place in May, 1938, were the tools of the well hung up? In other words, was there a cessation of operations at the well for a period of time?

A. Well, what years do you mean?

Q. 1938, subsequent to this meeting that you have identified as having taken place in May.

A. Well, if you go back to 1935, when we started the [203] well,——

Q. No, I am asking you now about 1938.

A. Yes.

Q. For how long a period of time was there a cessation of drilling operations following that May, 1938, meeting?

A. Well, we had—we were then in operation at the time, and we started somewhere along about the middle of April to rehabilitate this well. This well had been drilled, directionally drilled through the same hole about five different times prior to April, 1938.

Q. Then after you started in April of 1938, you continued drilling operations there for a period of time that ran into May or June, did you not?

A. No, it ran into May the 29th. That is when we surveyed the hole, and ran the Schlumberger.

Q. On May 29, 1938?

A. That's right.

Mr. Rice: May I see Defendants' Exhibit C, please.

(The document was handed to counsel.)

Q. (By Mr. Rice): Mr. de Bretteville, I show you a letter marked Defendants' Exhibit C, which

(Testimony of Gustav de Bretteville.)
is a photostat of November 2, 1938, a letter addressed to Treasure Company, and signed by Mr. Seeple. Do you recall having received that letter?

A. Yes. [204]

Q. Would you explain to the court the circumstances under which this letter was received?

A. Yes. I waited in Mr. Bodkin's office while Charles Gass, Mr. Bodkin's law partner, and Mr. Wynn went to Halvorsen and Halvorsen's office, and when they came back they came back with the original letter from which this photostatic copy is made.

Q. Were you expecting such a letter?

Mr. Allen: I object to that as immaterial.

The Court: I will sustain the objection.

Q. (By Mr. Rice): Was this letter received as a part of negotiations with Mr. Seeple?

A. That letter, when it was received by me, and, as you see, the signatures there are all Seeple's, the only thing that I could say at that time was that I did not know whether Seeple was authorized to sign for these various other people.

Q. Had you been negotiating with Mr. Scoville prior to the receipt of this letter?

A. I don't think so. I think all the negotiations were carried on through Bodkin and Gass.

Q. But Mr. Bodkin was your attorney, was he not? A. That's right.

Q. Well, Mr. Bodkin was negotiating with your authorization, was he not?

(Testimony of Gustav de Bretteville.)

A. No, he was negotiating with the authorization of the [205] Treasure Company,——

Q. Right.

A. ——because the Treasure Company paid the bills.

Q. Well, what was the negotiation about which Mr. Bodkin was conducting with Treasure Company's authorization?

A. Well, in June of that same year Scoville and the Adamant Company didn't go forward with the completion of the well.

Mr. Allen: I ask that be stricken as a conclusion of the witness, your Honor.

The Court: I will strike that. You can give a direct answer to the question.

Q. (By Mr. Rice): I would like for you to tell us, Mr. de Bretteville, what the scope of the negotiation was between Mr. Bodkin, as attorney for Treasure Company, and Mr. Scoville.

Mr. Allen: I object to that as apparently calling for hearsay.

The Court: I think it does call for hearsay. I don't know that it is of any materiality.

Q. (By Mr. Rice): Mr. de Bretteville, in this trial there has been introduced certain testimony of George Halverson, which was given in the condemnation suit, in the distribution proceedings before Judge Westover, I believe, in which Mr. Halverson stated, "I was representing—I have forgotten the title of the case that was brought, but the first case that was brought for declaratory relief,

(Testimony of Gustav de Bretteville.)

I went to your office,"—meaning [206] Mr. Bodkin's office—"met with Walter B. Scoville, met Mr. de Bretteville there, and we discussed the question of compromise, and the terms, somewhat the terms of resuming work on the well."

Was this letter of November 2nd which I have shown you a part of the compromise that was referred to by Mr. Halverson as having been the subject of a discussion with you and Mr. Bodkin?

Mr. Allen: I object to that as calling for a conclusion.

The Court: Overruled. I don't know what you are leading up to. Go ahead. Let's have the answer. I don't know what you are leading up to. Go ahead.

The Witness: That was the termination of this compromise, that they would furnish all the money necessary for the completion of the Treasure Well.

Mr. Allen: I ask that be stricken as a conclusion of the witness and disputes the——

The Court: I will sustain it on the ground that I don't think it is material. I will strike the answer.

We are concerned only with one question, and that is this: No one disputes that Mr. Scoville made this agreement. The only question is, did he bind himself by this two for one contract, or did he bind the others?

Now, I have allowed testimony to go in so there will be facts on which I can make a finding, although I believe it is [207] res judicata, because that question was before Judge Westover. He heard the evidence, and everybody, including Mr. Seeple,

(Testimony of Gustav de Bretteville.)

was before him. Everybody who is before the court here was before him, and everybody who could be bound was there. But I am allowing it to go in so that I do not need to base it upon that, but I can go into the facts and determine whether, aside from any question there, there is evidence enough to sustain a similar conclusion.

Then the rest of it is merely a question of this: Has Mr. de Bretteville received monies which have not been accounted for by him to the corporation? That is because the plaintiffs here, who have an interest, have a right to an accounting, so that it would be determined whether the award to them is correct, or whether it should be increased by reason of anything showing up in the accounting. And those are the only issues we have here.

The accounting is before the court, and I think from what was said this morning, with some little additional testimony from the record, we can straighten it out. It has occurred to me since noon that it will not even be necessary to make any special findings on the accounting, that the record will show we have taken additional testimony, and we can cover the whole thing in one set of findings. When the case is decided we will also make findings as to how the account stands, so that the whole thing can be covered in two sets of findings, [208] one relating to the facts to be found, and the other to the statement of account. So I cannot see the materiality of all these matters.

Sometimes the kind of conferences that were be-

(Testimony of Gustav de Bretteville.)

ing carried on may bear upon the question of whether it is claimed that a certain agreement was made on one side, and that it is denied on the other. He has already given us his version of the transaction, and what was going on as to the others is not material. Counsel have not brought in any of those other judgments, so it isn't necessary for you to explain what monies may have been received out of certain judgments, or to whom it went, so I don't see the materiality.

If you will tell me wherein you think it is material to any issue in this case, I will be glad to listen to you.

Mr. Rice: Your Honor, in our Answer we have set forth as an affirmative defense the fact that this agreement on November 2nd, which is now in evidence as Defendants' Exhibit C, was a part of a compromise which the parties entered into, under the terms of which Scoville and The Adamant Company were obligated to furnish all of the completion monies that were required for the completion of the well.

The Court: We have already heard the preliminary. The contract speaks for itself.

Mr. Rice: Very well.

The Court: And if the contract by its nature shows that [209] it was the intention to adjust everything, or to make certain conditions, then the contract is evidence of that. I cannot see how the preliminary matters matter. I have no objection to his saying that prior to the execution, or, you might

(Testimony of Gustav de Bretteville.)

state this, without going into details, you might state that this agreement was arrived at after lengthy discussions involving compromise, without going into the details, merely as a background, but I think that is already apparent from the testimony in the record.

Mr. Rice: Very well, your Honor.

Q. Mr. de Bretteville, did you at any time after the receipt of this November 2, 1938, letter receive any payments from The Adamant Company or Scoville with respect to the completion costs of the well?

Mr. Allen: I think, your Honor, that is all covered in the audit.

The Court: I beg pardon?

Mr. Allen: I think that is all covered in the audit.

The Court: That is all right. Overruled. Go ahead.

The Witness: There was a—no, I didn't receive any.

Q. (By Mr. Rice): Did the Treasure Company receive any?

A. There was a trustee fund that Mr. Seeple and myself signed the checks for on everything that was purchased, up to the point of wherever they had the funds in there, and when there wasn't any more funds, why, there wasn't any more need [210] to sign checks. And that fund was called the Treasure Company Trust Fund.

The Court: That money—this money that they

(Testimony of Gustav de Bretteville.)

derived from these side agreements, we might call them, was that turned over and was that in the name of Treasure Company or of this group by a trustee?

The Witness: No, it was put into a trust fund that was called the Treasure Company Trust Fund No. 1.

The Court: And that is the money from Mr. Bullen and Doctor Hayward?

The Witness: Yes, sir.

The Court: That money, so far as you were concerned, came to you or to Treasure through Scoville?

The Witness: Yes, it was put into a trust fund that Mr. Seeple and I signed the checks on.

The Court: I see. All right.

Q. (By Mr. Rice): Now, Mr. de Bretteville, on what date did the drilling operations—on what date was the Treasure Well completed?

A. Treasure Well was—the drilling on Treasure Well and the setting of the casing was completed around about the 1st of December, 1938, and then after that it was put on production, and was abandoned on the 15th day of December, 1938.

Q. Was it December 15, 1938, that Mr. Seeple ceased [211] to be at the drill site in charge of operations? A. Yes, sir.

Q. And on December 15, 1938, do you recall approximately how much in unpaid bills there were for the completion of the well?

A. Yes, a short time thereafter we learned they

(Testimony of Gustav de Bretteville.)

had run a credit of about $38,000, a little more than $38,000, which they had charged against this well, and were unable to pay.

Q. There were then unpaid bills for completion costs amounting to some $38,000 on December 15, 1938? A. Yes, sir.

Q. Now, when the drilling operations resumed on Treasure Well, which Mr. Seeple this morning testified to have occurred in November of 1938, that the operations were resumed there, was there credit for the completion costs of the well, which had been arranged by Mr. Scoville or The Adamant Company?

A. They negotiated for casing, and tubing, and other equipment to be placed upon the well, so that the well could be put on to production.

Q. Well, with whom did they negotiate?

A. Well, principally with Oil Tool Corporation.

Q. Where is that located?

A. In Long Beach.

Q. You say they negotiated. Did they complete the negotiations so that the credit was furnished by them? [212]

A. No, the Treasure Company——

Mr. Allen: I think, your Honor, that calls for a conclusion. The documents in the matter will speak for themselves.

The Court: Yes. I will sustain the objection.

Q. (By Mr. Rice): Did Treasure Company sign any notes to the Oil Tool Corporation in connection

(Testimony of Gustav de Bretteville.)

with the furnishing of equipment for the completion of the well?

A. Yes, the Oil Tool Corporation would not take——

Mr. Allen: I think the question has been answered, your Honor.

The Court: Just answer "Yes" or "No," and then you may explain.

Q. (By Mr. Rice): How much was the amount of the note the Treasure Company executed to Oil Tool Corporation, do you recall?

A. I believe it was somewhere around, in all about $22,000, or thereabouts, and I think the first note was about between nineteen and twenty thousand.

Q. I believe you have already testified that there was no money received from Mr. Scoville or The Adamant Company after December 15, 1938; is that right? A. What is the question?

Q. Did Treasure Company receive any money from Mr. Scoville or The Adamant Company after December 15, 1938? A. No. [213]

Mr. Rice: That is all, your Honor.

The Court: All right. Cross examine.

Mr. Allen: Just one or two questions, your Honor.

Cross Examination

Q. (By Mr. Allen): On December 15, 1938, you were a member of the executive committee under the April 5th contract, weren't you?

A. That is right, but——

(Testimony of Gustav de Bretteville.)

Q. You have answered.

A. ——I was forbidden to come upon the property by Mr. Wynn.

Mr. Allen: I ask that that be stricken as a conclusion of the witness, your Honor.

The Court: No, it is a modification of his answer, because the answer would imply that he was a trustee and had access to the property. He said he was, but he didn't have access to the property.

Q. (By Mr. Allen): When were these notes you claim were signed to the Oil Tool Corporation? Do you remember the dates?

A. I think that the first time when they first negotiated for credit there and couldn't get it, the Oil Tool Corporation had us sign some notes in about June, 1938, but the guarantee money was not put up by the Scovilles, so that deal fell flat, [214] and later on I think that they were to put up the necessary guarantee, and I think that that was somewhere in the latter part of November; I'm not sure.

Q. But it was in 1938?

A. But 1938. And then Oil Tool Corporation required that the Treasure Company sign the notes.

Q. Isn't that always required, that the operator of the well has to sign the notes?

A. Well, I objected——

Mr. Rice: Objected to as calling for a conclusion.

The Court: No, the question is, did he? All right.

The Witness: I objected to it because of the fact that they had signed this letter of November

(Testimony of Gustav de Bretteville.)

2nd, wherein they said that they would furnish all of the money, but eventually Mr. Bodkin said, "Well, this equipment is going over on to the Treasure Well, and you had better cooperate with them and sign that note."

Q. (By Mr. Allen): And you signed it?

A. Yes, the Treasure Company signed it and got stuck for it, for all of the bills.

Q. In other words, the bills were paid out of production, weren't they?

A. The bills were not to be paid out of production. They never paid for their interest, and the——

Q. Well, actually,—— [215]

The Court: Let him finish. Let the witness finish.

Mr. Allen: Very well.

The Witness: And, furthermore, the judgment states that they are to pay for their interests, and they never paid for it.

Q. (By Mr. Allen): The casing was paid for out of the production of the well at the rate of $1,000 a month, wasn't it? A. That's right.

Q. And there was $100 a month payable to the Lacey Tool Company, in addition to the $1,000 a month, wasn't there?

A. Yes. At the time that they abandoned the well on the 15th day of December, I went around and saw the creditors, I borrowed the money, made a payment down to these various creditors, and arranged to pay for the rest of it, of the bills, out of production.

(Testimony of Gustav de Bretteville.)

Q. All right. At that time the Treasure Company had no funds, did it?

A. No, they didn't have any funds. I went out and borrowed the money to save the day.

Q. You knew all of this information in reference to the guarantee, and the purchase, and so forth, in 1938, the guarantee to the Oil Tool for the casing, and you knew that and you had that information, as you testified, in 1938, didn't you?

A. Yes, in 1938 I had that information.

Mr. Allen: Yes. If the Court please, I am just calling to the court's attention the fact that the State Court action was tried in 1940, and this is all res judicata. That is our position. That is all.

* * * * * [217]

Mr. Kolliner: Your Honor, there is one question and one answer in the deposition of Mr. Scoville, which I think should be read into the record.

The Court: All right, read it.

(Thereupon a portion of the deposition of Walter B. Scoville was read:)

Mr. Kolliner: It is on the bottom of Page 11 of the deposition:

"Q. Did the three of these parties"—and prior questions indicate the three referred to are Messrs. Seeple, Wynn and de Bretteville—"agree to the proposition that you gave them on the raising of the finishing money?

"A. No, they did not. Mr. de Bretteville was bound he was going to get rid of me and he went out of [225] his way to make propositions to others

wherein I would be skidded out of the picture. The letter of June 2nd is proof of that. However, he did agree to give other people two for one."

This is in the deposition of Mr. Scoville, and is in response to a question elicited by the counsel in Salt Lake City, or, rather, in Logan, I think it was, who took his deposition.

The Court: All right.

Mr. Hoge: I believe that there is something further on there, as I remember, in that deposition about Bullen and Hayward. I think maybe that should be completed, your Honor. As counsel read there, he said: "However, he did agree to give other people two for one."

And then: "Q. Can you name any person with whom he agreed to do that?

"A. No, to my own knowledge I cannot tell you that.

"Q. Then did Mr. Seeple and Mr. Wynn agree on the proposition two for one plus 1% from your royalties?

"A. They did. Not only did they agree to it but in one instance they raised money themselves under the same terms."

Mr. Kolliner: I would object to that, your Honor, on the ground that in so far as the raising of money is concerned, [226] it has been testified that these three constituted an independently acting committee, and in so far as any agreement that may have been made by Mr. Seeple and Mr. Wynn and Mr. Scoville is concerned, it is not binding upon the

defendant Treasure Company or the defendant de Bretteville.

The Court: It may go in, because Mr. Seeple is in court, and he has testified. It may be corroborative of what Seeple testified to. Whether it is binding on the others is not material. [227]

* * * * *

The Court: I am going to make a statement, and then I am going to arrange to have the matter briefed. I think the question should be briefed, or, let's put it this way: In the first place, I think there should be briefs in the case, but they should be limited to the following propositions:

First of all, whether the statute of limitations applies to Bullen and Hayward, or to the claim of $13,000 by Mr. Scoville.

I may say that I am inclined to think that as we are dealing with persons who had no interest,—who were solicited, and not persons who were a part of the venture, that it may well be that the language recited by Mr. Scoville in the letter is broad enough to make an assignment or is broad enough to constitute, in reality, an assignment so that the statute of limitations would not begin to run until the fund came into existence.

However, I am of the view, and I don't want any argument on that point, that so far as Bullen and Hayward are concerned, first, that the finding of Judge Westover is determinative of the matter, and, second, that if it is [230] not, the facts in the case or the admissions contained in the letters by Dr. Hayward and others indicate that he was looking to

Scoville, and not to the Treasure Company. In other words, that the Treasure Company is not bound by the two for one agreement.

I am also of the view that under no circumstances could Scoville have cut himself in on a two for one agreement, when he was one of the interested parties, but the only question as to the $13,000, there being no evidence in this case to show that it had been advanced, and the only point I want briefed is whether there are admissions in the record showing that that amount is due, and if there are, then the statute of limitations has not run. It can't run, in fact, and that would bring in the matter an action of whether it is properly deductible. [231]

[Endorsed]: No. 14897. United States Court of Appeals for the Ninth Circuit. Herschel Bullen, Mary H. Bullen, J. C. Hayward and Marian S. Hayward, Appellants, vs. G. de Bretteville, Treasure Company, Walter B. Scoville and The Adamant Company, Appellees. G. de Bretteville and Treasure Company, Appellants, vs. Walter B. Scoville and The Adamant Company, a corporation, Appellees. Transcript of Record. Appeals from the United States District Court for the Southern District of California, Central Division.

Filed: October 13, 1955.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 14897

HERSCHEL BULLEN, MARY H. BULLEN, J. C. HAYWARD and MARIAN S. HAYWARD, Appellants,

vs.

WALTER SCOVILLE and THE ADAMANT COMPANY, Respondents.

STATEMENT BY APPELLANTS HERSCHEL BULLEN, MARY H. BULLEN, J. C. HAYWARD AND MARIAN S. HAYWARD OF POINTS UPON WHICH THEY RELY ON APPEAL

Pursuant to Rule 17(6) of this Court, the above named appellants adopt as their statement of points upon which they rely on appeal the statement of points on appeal filed in the District Court, which they have designated as part of the printed record.

HOGE & PERRY,
/s/ By FULTON W. HOGE,
Attorneys for Appellants and Plaintiffs in Intervention Herschel Bullen, Mary H. Bullen, J. C. Hayward and Marian S. Hayward.

Affidavit of Service by Mail attached.

[Endorsed]: Filed Oct. 20, 1955. Paul P. O'Brien, Clerk.

[Title of U. S. Court of Appeals and Cause.]

STATEMENT BY APPELLANTS G. de BRETTEVILLE AND TREASURE COMPANY OF POINTS UPON WHICH THEY RELY ON APPEAL

Pursuant to Rule 17(6) of this Court, the above named appellants adopt as their statement of points upon which they rely on appeal the statement of points on appeal filed in the District Court, which they have designated as part of the printed record.

NICHOLAS & MACK,

/s/ By JOHN H. RICE,

Attorneys for Appellants G. de Bretteville and Treasure Company, a corporation

Affidavit of Service by Mail attached.

[Endorsed]: Filed October 28, 1955. Paul P. O'Brien, Clerk.